AN

ACCOUNT

OF THE

ARGUMENTS OF COUNSEL,

AND THE

DIRECTIONS OF THE COURT

IN THE CASE OF

THE KING AND FOY.

AN

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OF THE

ARGUMENTS OF COUNSEL,

AND THE

DIRECTIONS OF THE COURT,

ON A Plea OF

Auterfois Acquit,

PLEADED BY JAMES FOY,

AT THE

SUMMER ASSIZES 1786, holden for the COUNTY of MAYO, at BALLINROBE,

ON THE FIFTH DAY OF JUNE,

TO AN Indictment FOR

PROCURING, STIRRING and PROVOKING

ANDREW CREAGH, otherwiſe CRAIG, AND OTHERS,

TO SLEE AND MURDER

PATRICK RANDAL M'DONNELL, ESQUIRE, AND CHARLES HIPSON.

WITH THE PLEADINGS IN THAT CASE.

DUBLIN:

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M.DCC.LXXXVI.

THE EDITOR of the Trials of GEORGE ROBERT FITZGERALD, Eſquire, and thoſe concerned in the *murders* of PATRICK RANDAL M'DONNELL and CHARLES HIPSON, having perceived a variance of opinion with regard to the law in that caſe, thought it a duty he owed to his profeſſion, and to himſelf, to *collect* the arguments which were urged in the proſecution of JAMES FOY, at the laſt *Ballinrobe* Aſſizes, for the *procurement* of that *murder*; eſpecially as a different conſtruction of 10 HEN. VII. *Cap.* 21 *ſeemed* to be entertained by the Judge who preſided there, from that which was laid down by the Judges who had preſided at former aſſizes.

THE Editor, with gratitude, acknowledges his having experienced a moſt liberal communication with the gentlemen who argued this caſe. They, for the moſt part, have favoured

favoured him with their notes. Where he has recourſe to himſelf only, he is ſure he may have injured the ſtile, the order, or the compoſition; but, he truſts, that even there the ſubſtance is juſtly, impartially and accurately taken. "*Ne quid falſi audeat, ne quid* "*veri non audeat*," being in his mind not leſs applicable to the *Reporter*, than to the *Hiſtorian*.

He has omitted giving any report of the argument of one gentleman; that gentleman having promiſed the public his thoughts upon the ſubject, by way of READING on the ſtatute of MURDER. HIS argument on circuit *haſtily*, perhaps, adopted, might happen to differ from his preſent opinions; *matured* by *reflection* and *improved* by *reſearch*. It would, therefore, be hardly fair, if they *differ*, to make him *combat*—if they *agree*, to make him *anticipate* the arguments he means to publiſh. In any event, whatever ſide of the topic he may adopt, the preſent editor has little doubt, when Mr. WHITESTONE's publication ſhall appear,

appear, that its diction will be eloquent, its ſubſtance ſolid, and its reaſoning ingenious.

THE Editor of theſe arguments has ſubjoined thereto, the ſtatutes of 10 *Henry VII.* and 9 *Anne*, that gentlemen, by compariſon, may ſee how far the arguments were appoſite to that branch of the ſubject of diſcuſſion. He has alſo ſet out the pleadings at large. The utility of this is too obvious to need remark.

IF it were the province of a *mere* reporter to obſerve upon the LAW, as it has now ſtood for almoſt *three centuries*, and which has, *ſo lately*, created a variety of opinions, he would ſay, that there is an eaſy remedy to be adopted by the legiſlature, namely, the REPEAL of the IRISH Statute of *Murder*, which has not been, perhaps, underſtood from a want in this kingdom of reported caſes determined upon that ſtatute; and the ENACTING of the ſeveral ENGLISH Laws which relate to this crime, and which are explained by

by numberleſs concurrent, uniform, and ſettled *authorities*. In this the Editor fears he aſſumes to himſelf a conſequence above his province, in ſeeming to *dictate* where he ought ſilently and ſubmiſſively to *follow*. Perhaps, too, he is adviſing to *cut*, where it is only neceſſary to *untie*.

Dublin, November 20th, 1786.

AN

AN

ACCOUNT

OF THE

PROCEEDINGS

IN THE CASE OF

THE KING AND FOY,

At the SUMMER ASSIZES for the County of *Mayo*, holden at *Ballinrobe*, on *Friday* the 5th of *October*, 1786, before the Honourable Sir SAMUEL BRADSTREET, Baronet, one of the Juſtices of his Majeſty's Court of King's-Bench.

JAMES FOY had been indicted at the Spring Aſſizes, 1786, for the county of Mayo, for traitorouſly and felonioufly being preſent, aiding, abetting, comforting, and aſſiſting Andrew Creagh, otherwiſe Craig, and others, in the murder of Patrick Randal M'Donnell, Eſq; at the bridge of Kilnecarra, in the county of Mayo; and afterwards, at an adjournment of the ſame aſſizes, tried and acquitted.

A new bill of indictment was thereupon ſent up againſt him, for traitorouſly and felonioufly *provoking*, *ſtirring up*, and *procuring* one Andrew Creagh, otherwiſe Craig, traitorouſly and felonioufly to *ſlee and murder* one Patrick Randal M'Donnell, then being a ſubject of our Lord the King, within the land of Ireland. This bill, which was ſimilar to that upon which George Robert Fitzgerald and Timothy Brecknock were convicted, attainted and executed, was immediately found, and remained a continuance to the then next aſſizes; Foy ſtill being held in cuſtody.

On *Saturday* the 6th day of *October*, 1786, (the ſecond day of the aſſizes, held at *Ballinrobe*, for the county of *Mayo*), Foy being brought up to be arraigned, Mr. Charles O'Hara, Mr. Williams, Mr. Ulick Burke, Mr. Owen, Mr. Stanley, Mr. Whiteſtone, and Mr. G. J. Browne, as counſel for Foy, prayed time to prepare a plea of *auterfois acquit*, and hoped that the Court would grant until the next aſſizes for that purpoſe.

Mr. *James O'Hara*, Mr. *Paterſon*, and Mr. *St. George Daly* urged, that as this was a continuance from the laſt aſſizes, that the priſoner ought to have been ready to have produced his plea *ſub pede ſigilli*; that if indulgences of this ſort were granted, when hardened ruffians had eſcaped the hand of juſtice for one crime, they would plead that acquittal in bar to a trial for another, and by that means prolong that life for five or ſix months, upon which the juſtice of their country demanded ſpeedy execution.

The *Court* ſaid that it had been Foy's own *laches* that he was not then prepared; that time ſhould be granted to prepare his plea, but it was impoſſible to grant him until the next aſſizes.

Mr.

Mr. *Browne* inſiſted, that there were no *laches* in Foy; that he could not know that any bill of indictment was found, until he was brought up to be arraigned; and therefore could not be prepared with his plea. He cited Hawkins *, to prove "that as the plea of *auter fois acquit* is a plea in "bar, and the record not in the cuſtody of nor "the property of him that pleads it, there is no "need to plead with a *profert ſub pede ſigilli*;" on the contrary, that there was a caſe in the books "when ſuch a plea was diſallowed, becauſe the "defendant ſhewed forth the record, when he "pleaded it." He alſo urged, that it is ſaid in Co. Littleton †, "that he ſhall have a day given "him to bring in the record," and that the aſſizes, like the term, being but one day, that 'till the next aſſizes ought to be given.

Mr. *Stanley* urged that as the plea was long, it would require conſiderable time to prepare it, and hoped that ſufficient time would be granted; the whole period between that and Monday would ſcarcely be more than enough to engroſs it; and the gentleman who was to prepare it, muſt of courſe give up all other profeſſional duty to the drawing that plea only.

The *Court* over-ruled Mr. Browne, and ſaid that they could grant only till Monday next, and deſired the priſoner then to be ready with his plea; and Mr. *Stanley* having applied for that purpoſe, ordered the Clerk of the Crown to give Foy, the priſoner, a copy of the record of the former acquittal, in order to his plea being prepared.

* Book 2. cap. 35. ſect. 2. † 128 b.

MONDAY, OCTOBER 8, 1786.

James Foy was brought up and arraigned on the following indictment:

County of Mayo, to wit. } THE Jurors of our Lord the King upon their oath preſent and ſay, That James Foy, otherwiſe Sladdeen, late of Turlogh, in the County of Mayo, Yeoman, not having the fear of God before his eyes, but being moved and ſeduced by the inſtigation of the Devil, on the 21ſt day of February, in the 26th year of the reign of our Sovereign Lord George the Third, now King of Great Britain, France, and Ireland, defender of the faith, and ſo forth, at Rockfield aforeſaid, in the ſaid county of Mayo, did of his malice prepenſed, wilfully, traitorouſly and felonioufly provoke, ſtir up, and procure Andrew Creagh, otherwiſe Craig, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rehanny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, and Patrick Dorning, otherwiſe Downey, and divers other perſons, at preſent to the Jurors aforeſaid unknown, to ſlee and murder one Patrick Randal M'Donnell, who was then and there a ſubject of our ſaid Lord the King, within this land of Ireland.

And the Jurors aforeſaid, upon their oath aforeſaid, further preſent and ſay, that the ſaid Andrew Creagh, otherwiſe Craig, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rehanny,

hanny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, Patrick Dorning, otherwiſe Downey, and divers other perſons, at preſent to the Jurors aforeſaid unknown, on the day aforeſaid, in the year aforeſaid, with force and arms, to wit, at Kilnecarra, in the county aforeſaid, in and upon the ſaid Patrick Randal M'Donnell, in the peace of God, and of our ſaid Lord the King, then and there being, wilfully, traitorouſly, and felonioufly, and of their malice prepenſed, did make an aſſault, and certain guns of the value of five ſhillings, each and every of the ſaid guns, being, then and there, charged with gunpowder and a leaden bullet, which guns they the ſaid Andrew Creagh, otherwiſe Craig, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rehanny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, and Patrick Dorning, otherwiſe Downey, in their right hands, reſpectively, then and there had and held, againſt and upon the ſaid Patrick Randal M'Donnell, wilfully, traitorouſly, and felonioufly, and of their malice prepenſed, and by the aforeſaid provocation, ſtirring up and procurement of the ſaid James Foy, otherwiſe Sladdeen, did ſhoot and diſcharge, and the ſaid Andrew Creagh, otherwiſe Craig, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rehanny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, and Patrick Dorning, otherwiſe Downey, with the leaden bullets aforeſaid, out of the guns aforeſaid, then and there, by force of the gun-powder aforeſaid, ſhot and ſent forth as aforeſaid,

ſaid, the aforeſaid Patrick Randal M'Donnell, wilfully, traitorouſly, and felonioufly, and of their malice prepenſed, and by the aforeſaid provocation, ſtirring up, and procurement of the ſaid James Foy, otherwiſe Sladdeen, then and there, did ſtrike, penetrate, and wound, giving to the ſaid Patrick Randal M'Donnell, then and there, with the leaden bullets aforeſaid, ſo as aforeſaid ſhot, diſcharged, and ſent forth, out of the guns aforeſaid, by the ſaid Andrew Creagh, otherwiſe Craig, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rehanny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, and Patrick Dorning, otherwiſe Downey, in and upon the body of him the ſaid Patrick Randal M'Donnell, ſever mortal wounds of the depth of four inches, and of the breadth of half an inch, and of which mortal wounds the aforeſaid Patrick Randal M'Donnell then and there inſtantly died.

And the Jurors aforeſaid, upon their oath aforeſaid, do ſay, that Andrew Creagh, otherwiſe Craig, Humphrey, George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rehanny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, and Patrick Dorning, otherwiſe Downey, the ſaid Patrick Randal M'Donnell, then and there, in manner and form aforeſaid, wilfully, traitorouſly, and felonioufly, and of their malice prepenſed, did ſlee and murder.

And ſo the Jurors aforeſaid, upon their oath aforeſaid, do ſay, that the ſaid James Foy, otherwiſe Sladdeen, then and there, in manner and form aforeſaid, wilfully, traitorouſly, and felonioufly,

ouſly, and of their malice prepenſed, did provoke, ſtir up, and procure the ſaid Andrew Creagh, otherwiſe Craig, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rehanny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, and Patrick Dorning, otherwiſe Downey, and divers other perſons, at preſent to the Jurors aforeſaid unknown, to flee and murder, in manner and form aforeſaid, the ſaid Patrick Randal M'Donnell, then and there being a ſubject of our ſaid Lord the King, within this land of Ireland, contrary to the peace of our ſaid Lord the King, his crown and dignity, and againſt the form of the ſtatute in that caſe made and provided.

To which he tendered *Propria manu* in parchment the following plea:

The King, againſt James Foy, otherwiſe Sladdeen.

PLEA, *Auterfois acquit.*

And the ſaid James Foy, by the aforeſaid bill of indictment named James Foy, otherwiſe Sladdeen, in his own proper perſon comes, and having heard the indictment aforeſaid read, and proteſting that he is not guilty of the premiſſes charged in the ſaid indictment, for plea, nevertheleſs ſaith, that he ought not to be compelled to anſwer to the ſaid indictment, becauſe he ſaith, that he hath heretofore been tried and acquitted of the wilful, and felonious killing of the ſaid Patrick Randal M'Donnell, for that at the general aſſizes and general gaol delivery held at Caſtlebar, in and for the county of Mayo, the 10th day of April, in the twenty-ſixth year of the reign of our Sovereign Lord George the third, of Great Britain,

RECORD.

Britain, and ſoforth, before the right honourable Barry Yelverton, Chief Baron of his Majeſty's Court of Exchequer in Ireland, and the honourable Sir Samuel Bradſtreet, Baronet, one of the Juſtices of his Majeſty's Court of Chief Place in Ireland, Juſtices and Commiſſioners of our ſaid Lord the King, and the honourable Richard Power, Eſq; ſecond Baron of his Majeſty's Court of Exchequer in Ireland, their aſſociate aſſigned to hear and determine all and ſingular treaſons, murders, man-ſlaughters, burnings, robberies, burglaries, felonies, unlawful aſſemblies, extortions, oppreſſions, tranſgreſſions, contempts, evil-doings, offences and cauſes whatſoever, and alſo from time to time to deliver the gaol of our ſaid Lord the King for the county of Mayo, of all priſoners and malefactors therein, being by virtue of a commiſſion of our ſaid Lord the King, under his great ſeal of his kingdom of Ireland, bearing date at Dublin, the 20th day of February, in the 26th year of the reign of our ſaid Lord the King, by the oath of twelve true and lawful men of the county of Mayo, whoſe names here follow, that is to ſay, Sir Neal O'Donnell, baronet, the right honourable James Cuffe, the honourable Henry Browne, Thomas Samuel Lindſay, Charles Coſtello, John Bingham, Thomas Lindſay, ſenior, Thomas Lindſay, junior, Francis Knox, Arthur French, George Miller, Chriſtopher Bowen, William Rutledge, Hugh O'Donnell, James Browne, Thomas Ormſby, John Ormſby, Richard Blake, Edward Browne, William Brabazon, George O'Maley, William Orme and James O'Donnell, when ſaid Jurors being then and there ſworn before the ſaid Juſtices and Commiſſioners, to enquire on behalf of our ſaid Lord the King and the body of the ſaid county, of all ſuch matters, articles and things as were then and there enjoined them, did preſent and ſay,

COMMISSION.

GRAND JURY.

ſay, that George Robert Fitzgerald, late of Turlogh in the county of Mayo, Eſq; Timothy Brecknock, late of the ſame place, Gent. Andrew Creagh, otherwiſe Craig, late of the ſame, yeoman, James Foy, late of the ſame, yeoman, John Fulton, late of the ſame, weaver, Charles King, late of the ſame, yeoman, John King, late of the ſame, yeoman, Abel Fulton, late of the ſame, yeoman, John Murphy, late of the ſame, yeoman, James Maſterſon, late of the ſame, yeoman, John Cox, late of the ſame, yeoman, David Saltry, otherwiſe Simpſon, late of the ſame, yeoman, Philip Cox, late of the ſame, yeoman, Richy Law, late of the ſame, yeoman, John Huſton, late of the ſame, yeoman, James Foy, otherwiſe Sladdeen, late of the ſame, yeoman, William Fulton, late of the ſame, yeoman, Samuel Stephenſon, late of the ſame, yeoman, John M'Mullen, late of the ſame, yeoman, William Kelly, late of the ſame, yeoman, William and Robert Logan, late of the ſame, yeomen, Wallace Kelly, late of the ſame, yeoman, James M'Cullogh, late of the ſame yeoman, John Chambers, late of the ſame, yeoman, John Chapman, late of the ſame, yeoman, Archibald Newen, late of the ſame, yeoman, John Bernee, late of the ſame, yeoman, Humphry George, late of the ſame, yeoman, Michael Brewing, late of the ſame, yeoman, John Rehanny, late of the ſame, yeoman, William Robinſon, late of the ſame, yeoman, Patrick Dorning, otherwiſe Downey, late of the ſame, yeoman, with divers other perſons, to the Jurors at preſent unknown, not having the fear of God before their eyes, but being moved and ſeduced by the inſtigation of the Devil, on the twenty-firſt day of February, in the twenty-ſixth year of the reign of our Sovereign Lord George the Third, now King of Great Britain, France and Ireland, defender of the faith, and

INDICTMENT.

ſo forth, with force and arms, at Kilnecarra, in the county aforeſaid, in and upon Patrick Randal M'Donnell, in the peace of God and a ſubject of our Lord the King, within this land of Ireland, then and there being, wilfully, traitorouſly, felonioufly, and of their malice prepenſed, did make an aſſault, and that the ſaid Andrew Craig a certain piſtol of the value of five ſhillings, then and there charged with gun-powder and one leaden bullet, which piſtol he the ſaid Andrew Craig in his right-hand then and there had and held againſt, and upon the ſaid Patrick Randal M'Donnell, then and there wilfully, traitorouſly, felonioufly, and of his malice prepenſed, did ſhoot and diſcharge, and that the ſaid Andrew Craig, with the leaden bullet aforeſaid, out of the piſtol aforeſaid, then and there by force of the gun-powder aforeſaid, ſhot and ſent forth, as aforeſaid, the aforeſaid Patrick Randal M'Donnell in and upon the left breaſt of him the ſaid Patrick Randal M'Donnell, then and there with the leaden bullet aforeſaid, out of the piſtol aforeſaid, by the ſaid Andrew Craig as aforeſaid, ſhot, diſcharged and ſent forth, wilfully, traitorouſly, felonioufly, and of his malice prepenſed, did ſtrike, penetrate and wound, giving to the ſaid Patrick Randal M'Donnell, then and there, with the leaden bullet aforeſaid, ſo as aforeſaid ſhot, diſcharged and ſent forth out of the piſtol aforeſaid, by the ſaid Andrew Craig, in and upon the ſaid left breaſt of him the ſaid Patrick Randal M'Donnell one mortal wound of the depth of four inches, and of the breadth of half an inch, of which ſaid mortal wound the aforeſaid Patrick Randal M'Donnell, then and there inſtantly died; and that the aforeſaid George Robert Fitzgerald, Timothy Brecknock, James Foy, John Fulton, Charles King, John King, Abel Fulton, John Murphy, James Maſterſon, John Cox, David Saltry, Philip Cox, Richy Law, John Huſ-

ton,

ton, James Foy, otherwiſe Sladdeen, William Fulton, Samuel Stephenſon, John M'Mullen, William Kelly, Patrick Dorning, William Logan, Robert Logan, William Fulton, Wallace Kelly, James M'Cullogh, John Chambers, John Chapman, Archibald Newen, and John Bernee, then and there wilfully, traitorouſly, felonioufly, and of their malice prepenſed, were preſent, aiding, helping, abetting, comforting, aſſiſting and maintaining the ſaid Andrew Craig in the treaſon and murder aforeſaid, in manner and form aforeſaid, to do and commit. And ſo the Jurors aforeſaid do ſay, that the ſaid Andrew Craig, George Robert Fitzgerald, Timothy Brecknock, James Foy, John Fulton, Charles King, John King, Abel Fulton, John Murphy, James Maſterſon, John Cox, David Saltry, Philip Cox, Richy Law, John Huſton, James Foy, otherwiſe Sladdeen, William Fulton, Samuel Stephenſon, John M'Mullen, William Kelly, Patrick Dorning, William Logan, Robert Logan, William Fulton, John Chambers, John Chapman, Archibald Newen, and John Bernee, the ſaid Patrick Randal M'Donnell, then and there in manner and form aforeſaid, wilfully, traitorouſly, felonioufly, and of their malice prepenſed, did ſlee and murder, againſt the peace of our ſaid Lord the King, his crown and dignity, and alſo againſt the form of the ſtatute in ſuch caſe made and provided. And afterwards, that is to ſay, at the ſaid General Aſſizes and General Gaol-delivery held at Caſtlebar aforeſaid, on the tenth day of April aforeſaid, in the twenty-ſixth year of the reign of our ſaid Lord the King aforeſaid, the aforeſaid James Foy, otherwiſe Sladdeen, came in his proper perſon under the cuſtody of the Honourable Dennis Browne, ſheriff of the ſaid county, to whoſe cuſtody the aforeſaid James Foy, otherwiſe Sladdeen,

ARRAIGNMENT.

for the cauſe aforeſaid was before that time committed, and further concerning the premiſſes in the ſaid indictment above ſpecified and charged, he the ſaid James Foy, by the ſaid indictment called James Foy, otherwiſe Sladdeen, being then and there aſked how he would acquit himſelf thereof, the ſaid James Foy then and there ſaid he was not guilty thereof; and concerning this for good and evil, he the ſaid James Foy, by the ſaid indictment called James Foy, otherwiſe Sladdeen, did then and there put himſelf upon his country, and the Right Honourable John Fitzgibbon, the Attorney-General of our ſaid Lord the King, to the county of Mayo, who for our ſaid Lord the King in this behalf proſecuted, did the like, and ſo forth; and it was commanded by the ſaid Juſtices and Commiſſioners, that the ſheriff of the county of Mayo aforeſaid ſhould cauſe to come before the Juſtices and Commiſſioners aforeſaid, twelve Jurors, and ſo forth, by whom, and ſo forth, and who were of no affinity to the ſaid James Foy, otherwiſe Sladdeen, and ſo forth, to recognize upon their oaths whether the ſaid James Foy, otherwiſe Sladdeen, was guilty of the ſaid treaſon and murder of the ſaid Patrick Randal M'Donnell, in the ſaid indictment ſuppoſed to be done or not. And that the Jurors of the ſaid jury being then and there impannelled and returned, that is to ſay, Thomas Samuel Lyndſey, Peter Lynch, Thomas Lyndſey, junr. John Bingham, William Ouſly, Bartholomew French, Arthur Lyndſey, Thomas Ormſby, Martin Kirwan, Edmund Gildea, Joſeph Lambert, and Courtney Kenny, being called, came; who being choſen, tried, and ſworn to ſay the truth of and concerning the premiſſes aforeſaid, in the ſaid indictment aforeſaid above-ſpecified, upon their oaths did ſay, that the ſaid James Foy, by the ſaid indictment,

PLEA—not Guilty.

ISSUE.

VENIRE.

PETIT JURY.

dictment called James Foy, otherwiſe Sladdeen, was not guilty of the treaſon and murder aforeſaid, in the indictment aforeſaid ſpecified in manner and form as was ſuppoſed againſt him, and that he did not fly for the ſame. And it was therefore conſidered by the ſaid Juſtices and Commiſſioners, that the ſaid James Foy, otherwiſe Sladdeen, of the premiſſes aforeſaid, in the indictment aforeſaid above ſpecified, be diſcharged and go without delay, as by the record of the ſaid proceedings before the ſame Juſtices and Commiſſioners more manifeſtly appears. And the ſaid James Foy, otherwiſe Sladdeen, further ſaith, that the murder and offence in the bill of indictment laſt above-mentioned on which the ſaid James Foy, otherwiſe Sladdeen, was by the Jurors of the ſaid jury acquitted in manner and form aforeſaid, is one and the ſame murder and offence for which bill of indictment on which the ſaid James Foy, otherwiſe Sladdeen, is now arraigned was found, and not a different murder or offence; and that the ſaid James Foy, otherwiſe Sladdeen, in the ſaid bill of indictment named, which the ſaid James Foy was by the Jurors of the ſaid jury acquitted in manner and form aforeſaid, and the ſaid James Foy named in the ſaid bill of indictment on which he is now arraigned, is one and the ſame perſon, and not a different perſon; and that by the laws now in force in theſe realms the ſaid James Foy ought not to be put on his trial again for the ſame murder and offence. Wherefore the ſaid James Foy prays the judgment of the Court, and that he may go diſcharged from the ſaid indictment on which he is now arraigned, and ſo forth.

VERDICT —Not Guilty.

JUDGMENT.

PLEA *Autrefois acquit.*

ED. STANLEY.

This

This plea being read through, Mr. *James O'Hara* ſaid that the Counſel for the Crown had the reply. He obſerved that the ſubſtance of their replication muſt be, that the traitorous killing and murder of which Foy had been heretofore acquitted is not one and the ſame treaſon with that of which he was now indicted.

The *Court* then obſerved, that the record of the acquittal and the plea did not agree; that in the former it was ſtated to be an acquittal of a *treaſon* and *murder*, in the latter it is averred to be the ſame *murder* and *offence*. That time might be waſtin arguing this point, and that to come at once to what was ſubſtantial, he wiſhed the plea might be amended, and the word *treaſon* might be inſerted in the ſeveral parts where it had been now omitted.

Mr. *Stanley* ſaid that he was now ready to argue, that murder was not treaſon in this kingdom; and he was therefore againſt amending of the plea.—But Mr. *Ulick Burke* having ſaid that he was not for ſplitting of hairs, when a man's life was concerned, and rather wiſhed to ſave his client than diſplay his eloquence; and therefore deſired to try no experiments, but would have the plea amended agreeably to the direction of the Court: with which the reſt of the counſel on the ſame ſide agreeing, the plea was accordingly amended, by inſerting the word *treaſon* in the ſeveral places where it is averred to be the ſame murder and offence. Whereupon the counſel for the Crown replied *inſtanter*, *in haec verba*.

REPLICATION. "And the ſaid Right Honourable John Fitzgibbon, who, for our Lord the King on this behalf "proſecutes, ſays, that the treaſon, murder and of-

"fence

" fence in the indictment laſt above-mentioned, on " which the ſaid James Foy, otherwiſe Sladdeen, was " by the Jurors of the ſaid jury acquitted in manner " and form aforeſaid, is not one and the ſame treaſon, " murder and offence for which the bill of indict- " ment on which the ſaid James Foy, otherwiſe " Sladdeen, is now arraigned and found.—And this " he is ready to verify."

James Foy then tendered the following rejoinder :—

" And the ſaid James Foy, otherwiſe Sladdeen, REJOIN-
" ſays, that the treaſon, murder and offence in the DER.
" ſaid indictment, of which the ſaid James Foy was
" heretofore by the Jurors of the ſaid jury acquitted
" in manner and form aforeſaid, is one and the ſame
" treaſon, murder and offence for which the ſaid
" bill of indictment on which the ſaid James Foy,
" otherwiſe Sladdeen, is now arraigned and found ;
" and this he prays may be enquired of by the
" country."

And iſſue was then joined, " and the Right SIMILI-
" Honourable John Fitzgibbon, his Majeſty's At- TER.
" torney General likewiſe." And a Jury was then ſworn to try this iſſue.

On the ſwearing of the Jury, Mr. *Owen* obſerved, that the priſoner had, on this iſſue, a right to challenges. Mr. *James O'Hara*, on the other ſide, ſaid, this being a collateral iſſue, he had no right to challenges. Mr. *Stanley* aſſerted that in collateral iſſues this went only to peremptory challenges. But the *Court* obſerved, that it would be time enough to argue the point when a challenge was made ; and a Jury was ſworn without any challenge being made.

Mr.

Mr. *Charles O'Hara* then prayed that as iſſue was joined, the record of the acquittal might be read in evidence to the Jury.

Mr. *James O'Hara* did not ſee how this could be done; that the Judge here acted under a new commiſſion, different from the laſt. This was to all intents and purpoſes another Court, and had no right to look into that record, until brought before it properly.

Mr. *Stanley* cited ſtat. 10 Car. I. ſeſſ. 2. cap. 14. ſect. 8. by which it is enacted, "That no proceſs "or ſuit before any juſtice of aſſize, gaol-delivery, "oyer and terminer, juſtice of peace, or other "of the King's commiſſioners, ſhall be diſconti-"nued by the making of a new commiſſion or aſ-"ſociation, or by altering of the names of the "juſtices, or other the King's commiſſioners; but "the new juſtices and commiſſioners may proceed, "as if the old commiſſion and juſtices and com-"miſſioners had remained."

The *Court* then ordered the Clerk of the Crown to read the record of the acquittal to the Jury; which was read accordingly.

Mr. *Charles O'Hara* then prayed that the preſent indictment ſhould be read in evidence; which being done accordingly, he ſaid, that the counſel on behalf of Foy then reſted their caſe; and the counſel for the Crown having reſted it there alſo, the *Court* told Mr. Charles O'Hara that the counſel for the Priſoner ought to begin; to which Mr. *Charles O'Hara* replied, that until ſomething ſhould be ſaid to ſhew the evidence that they had laid before the Court to be inſufficient to maintain the affirmative of their iſſue, he thought it unneceſſary for him to ſay one word.

Mr.

Mr. *James O'Hara*, the ſenior Counſel for the Crown, proceeded by ſaying, that he would ſubmit his reaſons to the Court and the Jury, for inſiſting that the priſoner had failed in mantaining the affirmative upon this iſſue. By his plea, he had undertaken to prove the offence, of which he was acquitted at the laſt aſſizes, one and the ſame with that to which he had juſt now pleaded. For this purpoſe two pieces of written evidence had been produced. The former indictment by which he had been accuſed of the actual murder, and the preſent indictment by which he was accuſed of procuring the murder to be committed. The one charges him with being preſent, and that he did ſlay, &c. the other, that he did procure others to ſlay.—He contended, though the offences were both high treaſon, though the puniſhment of both was equal, and though both the facts were in the eye of GOD and man equally attrocious, yet they were ſtill diſtinct and ſeparate facts, which the Jury, upon their oaths, could never undertake to ſay were the ſame.

[Here the priſoner interrupted Mr. James O'Hara, and deſired of the Court to put Mr. James O'Hara to his oath, if he, the priſoner, had not been before tried for the ſame fact, and if he, Mr. James O'Hara had not been of counſel againſt him.]

The *Court* directed Mr. James O'Hara to go on.

Mr. *James O'Hara*.—Though the offences are both high treaſon, they would, he was certain, be compared to the caſe of principal and acceſſory in felonies, and did he not know that ſome ſubtle and refined arguments would be adduced, and ſome crude and undigeſted opinions urged upon the ſubject, he would be content to reſt his caſe upon the

two pieces of evidence which had been produced. But as he knew that this kind of reaſoning would be uſed, he alſo thought it neceſſary to argue it on this ground of principal and acceſſary—He would premiſe to the jury that the Crown law books were filled with elaborate diſtinctions between principals and acceſſories in felonies, between principals in the firſt and principals in the ſecond degree, and between acceſſories before and acceſſories after the fact, and that the only reaſon why theſe diſtinctions are ſo carefully and anxiouſly made is, becauſe that the offences ſpecifically differ; and the law requires to keep their boundaries ſeparate, to prevent that confuſion which would ariſe by blending offences.

He ſhould firſt argue it as if it were merely a felony, and that the priſoner bore to the perpetrators of the murder the relation of principal to acceſſory; and he would afterwards ſhew that it was a diſtinct ſubſtantive treaſon.

The plea of auterfois acquit is grounded on this benevolent maxim of the law, "that a man ſhall "not be brought into *danger* of his life more than "once for the *ſame offence*." That, and that only, was the foundation of this kind of plea, and it lay not in any other caſe. If he had been acquitted on an erroneous indictment, if he had been tried in a wrong county, he could have had no benefit from this plea, for this reaſon, that his life had not been before in danger for the ſame offence—upon the ſame principle if he had been acquitted as acceſſory before, he could be indicted again as principal—ſo too if he had been acquitted as acceſſory after he could be again indicted as principal, or acceſſory before. In ſhort, that there was no caſe in which the life of a man was not in danger upon the trial

of

of an indictment in which he might not be again indicted and tried. It would be therefore good ground to judge whether the offences were the ſame or not, by conſidering whether his life were ever before in danger; and he contended it was not. He cited Foſter 362, that " it muſt be " admitted that a perſon indicted as principal can- " not be convicted on evidence tending barely to " prove him an acceſſory before the fact." He alſo cited 2 Hawk. P. C. 373, as uſing three authorities, in which the ſame poſition had been ſtrongly holden. He apologiſed for not having had recourſe upon this occaſion to the original books, having only got his brief upon circuit, and was therefore obliged to cite them as referred to in the margin of Hawkins.—They were Keilway 107. Dalon, 14. and Lambart B. 2. C. 7. Foſter and others alſo were expreſs authorities in point, and there was not a ſhadow of authority, nor a *dictum* againſt the poſition which he laid down, " that a perſon indicted as principal cannot be convicted on evidence tending to prove him an acceſſory before the fact," ſave one caſe in the margin of Hawkins, 373, where he mentions the caſe merely to reprobate it as abſurd, becauſe it ſeemed founded in a contrary principle, (the caſe as cited is 8 H. 5, 6. pl. 26.) Beſides the caſes in the books, the caſe of this very Foy is an authority in the point, for it was clear from the evidence upon his trial at the laſt aſſizes, that he was acceſſory before the fact, and yet he was acquitted under the direction of two learned Judges who held that that evidence, though full, was not ſufficient to convict him as principal, and they therefore, afterwards, permitted a new indictment to be ſent up againſt him as acceſſory before the fact. It was clear that Foy could not be found guilty on the former indictment upon evidence merely ſhewing him to have procured the

murder, and in fact was not convicted on the former indictment. Why? becauſe it was not the ſame offence with which he was charged; and as he could not be convicted, his life was not in danger. It is agreed in all the books, that an acquittal as an acceſſory to an offence, whether before or after, is no bar to an indictment againſt the ſame perſon as principal in the ſame offence; and upon this principle, that the offences are ſpecifically different. It is agreed, that one acquitted as principal may be indicted as an acceſſory after; upon
* 362 the ſame principle, this is ſaid by Foſter,* to have been ſo ruled in Kelyng, 25, 26. "upon found principles of law and reaſon." If then an acquittal as acceſſory before the fact be not a bar to an indictment of the ſame perſon as principal, *becauſe the offences of acceſſory before and principal are different*, does not it follow from the *ſame reaſon*, that the acquittal as principal cannot bar an indictment of the ſame perſon as acceſſory before the fact?—Does the circumſtance of either indictment being firſt found, vary the nature of the offences?—If Foy had been firſt indicted for provoking, ſtirring and procuring, it is clear that he could now be indicted for ſlaying and murdering, and it is hard to diſcover why *e converſo* he might not be firſt indicted for ſlaying, and afterwards for the procurement—If the offences ſpecifically differ, he may after acquittal of either offences be indicted of the other. If the offences are ſubſtantially the ſame after acquittal of either, he cannot be indicted of the other. But he may be indicted in the one caſe, and therefore he ought in the other.

He would now ſhew from authorities, that auterfois acquit would not hold in the principal caſe.

8 Ed. I. 2 Cor. 424. is cited in 1. H. H. 626, and again in 2. H. H. 244, and Keilway 107. Dalis 14. and Lamb. B. 2. c. 7. are all quoted in 2 H. 373. as expreſs to this point—" that one acquitted as principal may be tried again as acceſſory before." To theſe he would add, the no leſs reſpectable authority of the 2 H. 273, and of Foſt. 362, which he would particularly conſider after he had taken notice of the authorities which might be mentioned as contrary. The caſes which are contrary are all cited in the margin of Hawk. P. C. 373. of which the principal is in the old book, 2 Ed. 3. 20. Pl. 14. which is abridged by Fitzh. Coron. 150, 282. and which he and the other abridgers and compilers have copied without any examination; but which ſerjeant Hawkins, *ubi ſupra*, ſhews to be inconſiſtent with itſelf, to be contradicted by all the other books; and to be ſo abſurd as to ſay, that a man acquitted as principal, ſhall not ſo much as be arraigned as acceſſory after; and he proceeds ſtill farther to ſtigmatiſe this caſe, by ſhewing that it is in part abſolute nonſenſe; and he quotes the words of it, which certainly deſerve that epithet.

Sir Mat. Hale, H.P. C. H. 240. 244. and 1 H.H.P. 626 takes up the ſame doctrine without examination, upon the authority of the ſame abridgement. He ſays, " If A. be indicted and acquitted as principal, he ſhall not be indicted as acceſſory before, and if he be, he may plead his former acquittal in bar." But in his ſecond volume where he is above cited, he has added by way of caution, " as it is held" and he there quotes the authority of the ſame miſtaken caſe, but he gives no opinion of his own, nor any reaſon for what he has cited, and in both places he quotes authorities from the Year books, to ſhew that the ancient law was otherwiſe. If this be ſo, and it cannot be denied to be ſo, and when an apparent and evident abſurdity ariſes from the change,

change, it is natural to enquire, When the law was thus altered? how it was altered? and Why it was altered?—and accordingly we find the learned Serjeant Hawkins and Mr. Juſtice Foſter (with the freedom which truth demands, but with that modeſty of expreſſion which learned men uſe when ſpeaking of the writings of others) have enquired into this ſubject and clearly ſhewn the abſurdity of this doctrine. 2 Hawkins, 373, and Hale's Summary, mention that it is holden in *late* books, "that an acquittal as principal is a bar to a proſecution as acceſſory before, becauſe ſuch an acceſſory being in ſome meaſure guilty of the fact, that which clears him from the fact *ſeems* to clear him from being ſuch an acceſſory." This aſſertion, then, has nothing but this weak reaſon to ſupport it, and if that fails, the aſſertion and the doctrine fall to the ground—Serjeant Hawkins, it is true, mentions this doctrine—but how? only to reprobate it, for he only expoſes and repeats the fallacy of this reaſoning in theſe words, "This is reaſonable, on the ſuppoſition that a man may be found guilty as a principal, on evidence proving him an acceſſory before the fact, but it ſeems difficult to be maintained if the contrary be law;" and he quotes three authorities expreſsly to ſhew that the contrary is law, and Foſter has been already quoted to the ſame point; "for then Hawkins goes on, the "acceſſory would get off by a mere ſlip in the in-"dictment, and bar all other proſecutions by an "acquittal on a trial, which in truth never brought "him into danger of his life," and he then gives authorities to ſhew that this plea lies not; and in the margin ſhews the miſtakes and abſurdities in the abridgments in which a contrary doctrine was aſſerted; and Foſter 361, 362, is yet more forcible, his words are, "it ſeemeth to be agreed, *upon what "grounds I know not*, that if A. be indicted as principal and

" and acquitted, he cannot be afterwards indicted as " acceſſory *before* the fact." For, " ſay ſome, *it is* " *in ſubſtance the ſame offence.*" Others, " if a man " inciteth to the offence, *he* is quodammodo *guilty* " *of the fact.*" And he goes on and ſays, " that " the reaſoning upon the caſe in Keiling, is founded " on a diſtinction between what preceded, or was " ſubſequent to the fact, and is, I confeſs, too re- " fined for my comprehenſion, and probably will " continue ſo until I can remove ancient land-marks, " and forget the legal diſtinction between principals " and acceſſories, and every principle of law found- " ed on it; for if the offences of the principal and " acceſſory do in conſideration of law *ſpecifically* dif- " fer, and if a perſon indicted as principal cannot be " convicted upon evidence tending *barely* to prove " him to have been an acceſſory before the fact, " which I think muſt be admitted, I do not ſee how " an acquittal upon one indictment could be a bar " to a ſecond for an offence ſpecifically different " from it."

Having thus ſhewed the old law, and having cited authorities to ſhew that it continued, by pointing out from Hawkins the miſtakes and abſurdities of the caſes which were contrary, he now relied upon the ſtrong arguments of Hawkins and Foſter, when applied to the principal caſe upon the doctrine of principal and acceſſory, for he had hitherto argued it, as if it had been a felony only, and as if the doctrine of principal and acceſſory had applied to it: but he ſhould now argue it upon the ſtatute.

And by the ſtatute ſlaying and murdering are made high treaſon; ſo alſo is provoking, ſtirring and procuring any other perſon to ſlay or murder. Doubts had been entertained on the words of the ſtatute, " that they ſhall be deemed tray- 10 Hen. vii. cap. 21.

tors"

tors," and theſe doubts were, whether the offences were not high treaſon only as to their conſequences: but acts of parliament made in *pari materia*, are the beſt expoſition of a ſtatute, and the ſtatute of Anne removes theſe doubts, for it recites that by an act of parliament made in this kingdom in the tenth year of King Henry VII. that murder of malice prepenſe *is made high treaſon*. If then it be high treaſon, all are principals, and all the arguments and reaſoning as to principals and acceſſories are done away. But beſide, the ſtatute 10th of Henry VII. has two branches; and makes two diſtinct ſubſtantive offences. No matter whether treaſon or not, they are as diſtinct as any two branches of the 25th of Edward III. or any other ſtatute. He was ſure that no one would contend that an acquittal on one branch of the 25th Edward III. would be a bar to an indictment on another branch of that ſtatute. It would be very abſurd to ſay, that one acquitted of coining ſhould not be tried for compaſſing the death of the King; yet this ſeemed to him, not more abſurd than to ſay, that becauſe it appears by a piece of parchment juſt now read to the Court and the jury, that James Foy did not himſelf kill Patrick Randal M'Donnell, that therefore he ſhall not be puniſhed for procuring another to do it.

9 Anne, cap. 4.

Mr. *Paterſon*, on the ſame ſide.—The fair ſtate of this queſtion is, whether an acquittal of murder be a plea in bar to an indictment for the procurement of a murder; and he contended, that no plea ſave only an acquittal or conviction of *ſpecifically* the ſame offence is ſuch a plea in bar. To ſee whether theſe were ſpecifically the ſame offence, he ſhould reſort to the act of Hen. VII. and that ſta-

10 H. vii. cap. 21.

tute

tute runs all in the disjunctive, and is as follows: " If any perſon or perſons, whatſoever eſtate, de- " gree or condition, he or they be, of malice pre- " penſed, do ſlee or murder, *or* of the ſaid ma- " lice provoke, ſtir, or procure any other perſon " or perſons to ſlee or murder any of the King's " ſubjects within this land of Ireland, be deemed " traitor attainted of high treaſon, likewiſe as it " ſhould extend to our ſaid ſovereign Lord's per- " ſon, and to his royal Majeſty." So that by this ſtatute he who of malice prepenſed ſlees or mur- ders, *or* he who procures, ſtand each in the ſame predicament, and each is guilty of high treaſon; and the disjunctive OR points them out to be ſeparate and diſtinct offences. Nor could any thing be more diſtinct than theſe two facts are made by the ſta- tute. But there was alſo another argument ariſing from the ſtatute itſelf; in the different parts of it the perſons committing the facts are differently de- ſcribed. In the part which ſpeaks of the actual commiſſion of the fact, it deſcribes them thus:— " If any perſon of *whatſoever ſtate, degree or con-* " *dition* he may be, do ſlee or murder;" which ſeems to refer to perſons in the higher orders of life; while in the clauſe which goes to the pro- curers, it deſcribes them by the words " ſhall pro- cure *any other* perſon," which evidently refers to another deſcription than perſons of ſtate, degree or condition; and might there not be a reaſon given for this ſtatute, when one looks to the hiſtory of the times, and the character of the monarch of that day, Henry VII. a man who deſired to draw every thing that he could into the royal *fiſc* by way of fine, forfeiture and amerciament. Having argued it on the ſtatute, he ſhould now reſort to the prin- ciples of law; and it is a maxim of law, as well as a maxim of natural juſtice, that *plus peccat auctor*

quam actor, that the man who bribes and ſets on a needy wretch to perpetrate a crime, and thinks to ſcreen himſelf from the law behind another, is a greater delinquent than the miſerable inſtrument he had uſed; and the law, in this inſtance, ſteps in to award him that puniſhment which his greater criminality deſerves. There is another way of ſeeing whether theſe offences of murder and procuring a murder be ſpecifically different, or ſpecifically the ſame offence, and that is by reſorting to the *law of evidence*: From it we learn that nothing can be given in evidence but what goes to the fact of which the priſoner is accuſed. Could evidence then be given to convict a man of murder, which went only to prove him guilty of procuring a murder to be committed?——Certainly not.—— If then the offences ſpecifically differ by the ſtatute, if the author of a crime be a more atrocious criminal than the perpetrator, and if it required a different kind of evidence for the conviction of the one offence, from the other, he concluded that the priſoner was never in jeopardy, and ought now to be tried.

Mr. *St. George Daly*, on the ſame ſide.—The counſel for the priſoner have put in the preſent plea, grounding themſelves upon a looſe opinion, thrown out by ſome writers upon crown-law, to this effect: That if a man be indicted as principal and acquitted, and be afterwards indicted as acceſſory before, he may plead the former acquittal in bar; for, ſay thoſe writers, it is in ſubſtance the ſame offence. It is upon this ſuppoſition alone that thoſe offences are in ſubſtance the ſame, that thoſe opinions are grounded; and he took it to be an eſtabliſhed maxim, that where any poſition is laid down as law, grounding itſelf wholly and excluſively

cluſively upon a particular reaſon, the ſtrength and validity of that reaſon muſt be the touchſtone whereby we are to judge of the poſition laid down as law; if the reaſon be found upon examination to be a ſound one, the poſition which has it for its foundation is thereby aſcertained to be law; if, on the other hand, the reaſon is diſcovered to be falſe and ſophiſtical, that it cannot bear the teſt of examination, but ſinks before it, the poſition ſupported by ſuch weak and fallacious reaſoning muſt ſink and fail likewiſe. In order to judge of the fallacy of this *dictum*, that the offences of principal or acceſſory before are in ſubſtance the ſame, it will be neceſſary to conſider two queſtions: 1ſt, Whether common ſenſe and reaſon conſider theſe offences as in ſubſtance the ſame. 2dly, Whether the law has not, upon all other occaſions, conſidered them as eſſentially different. Common ſenſe has drawn the cleareſt diſtinction between them, in this reſpect alone, if in none other, in the degree of offence. He who inſtigates another to commit an offence, though ſtiled in law the *acceſſory*, is certainly the greateſt criminal in fact, with reſpect to murder, particularly the procuring that offence to be committed is an infallible ſymptom of a black and unmerciful diſpoſition; whereas he who actually commits the fact may be a blind inſtrument, and not a deliberate villain. In the firſt caſe there is no room for mercy, and accordingly he believed there was no inſtance in which the royal mercy had been extended to the deliberate procurer of a murder. In the ſecond inſtance, the commiſſion of the crime might be the conſequence of impoſition, weakneſs or ignorance; the preſent tranſaction furniſhed him with an inſtance, where wretches were perſuaded to believe that it was lawful to commit murder, and four of thoſe deluded people had ac-

cordingly been conſidered as proper objects of mercy. This ſhewed ſo clearly the actual difference between thoſe offences, that it would be miſſpending time to enforce it any further upon that ground.——With reſpect to the ſecond queſtion, Whether the law had not upon all other occaſions conſidered thoſe offences as eſſentially different; he thought it moſt clear, that it had. This might be gathered, firſt, from the very authors themſelves, who, upon this occaſion, have hazarded the contrary poſition; ſecond, from the general idea which the laws entertain of thoſe offences.

Lord Hale, and Stamford, as he is quoted by Hale, have laid it down, 1 Hale 626. 2 Hale 244. that if *A* be indicted as acceſſory before, he may plead (as it is held) *auterfois acquit*, as principal, becauſe it is in effect the ſame offence. In ſupport of this, he cites 2 Ed. III. but, ſays he, antiently the law was otherwiſe, 3 Ed. II. and he (Mr. Daly) believed it remained a ſecret at this day how the law came to be altered. Now, if the offences of acceſſory before, and of principal, be in effect the ſame, he contended that it was pretty clear that the converſe of the propoſition muſt be ſo. And yet, ſays Lord Hale, in the preceding ſentence, if *A* be indicted as principal, and *B* as acceſſory before or after, and both be acquitted, yet *B* may be indicted as principal, and the former acquittal as acceſſory is no bar; for this plain reaſon, for no other can be aſſigned, that they are offences in ſubſtance different; ſo that if the law be, as is argued by the counſel for the priſoner, this manifeſt abſurdity muſt be the conſequence—that two offences diſtinguiſhed by different names, diſtinguiſhed by the law in many different reſpects, ſhall, to anſwer one purpoſe, be conſidered as one offence, and for all other purpoſes be conſidered as two offences

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ſpecifically different. Now the poſition he had contended againſt, has been laid down by one or two writers upon crown-law. This poſition has been controverted by others, particularly Hawkins and Forſter; but all the writers upon crown-law agree in conſidering thoſe offences, upon all other occaſions, as ſpecifically different. With reſpect to two contradictory opinions, if one is followed, the other muſt of courſe be rejected. If we mean to preſerve conſiſtency, which opinion then are we to adopt? Certainly that in which the authorities agree, not only with each other, but with common ſenſe. With reſpect to the general idea which the law entertains of thoſe offences, it is manifeſt that wherever it treats of them, it marks a ſtrong diſtinction between them; and indeed if it were otherwiſe, the whole fabric of legal doctrine relating to principal and acceſſory muſt fall to the ground: for inſtance, it is agreed on all hands that the acceſſory ſhall not be tried until the principal be convicted, unleſs by conſent; but if they are offences in ſubſtance the ſame, the ſame evidence would ſupport an indictment for either offence. In order therefore to render the foregoing poſition nugatory, nothing more could be neceſſary than to indict a man as principal, and offer evidence of an acceſſorial nature againſt him; and by this means the law relating to principal and acceſſory would become a dead letter, and the words *principal* and *acceſſory* nothing but empty ſound.—— But the law has wiſely guarded againſt this abſurdity, by drawing the moſt marked difference between thoſe offences. Indictments for each offence muſt be laid in words ſubſtantially different; the evidence in ſupport of each indictment muſt be ſubſtantially different. If *A* be indicted as principal, evidence cannot be adduced to prove him acceſſory

acceſſory and *e converſo*. Plainly for this reaſon—becauſe the law looks upon thoſe offences as totally different. And it is upon this ground that Serjeant Hawkins, * denies that ſuch a plea as the preſent ought to be allowed in this caſe. He ſays, it would be very reaſonable, on the ſuppoſition that a man may be found guilty as principal, on evidence which proves him to have been acceſſory before; but ſeems difficult to be maintained, if the contrary opinion be law: for then a man in truth guilty as acceſſory before, would get off by a mere ſlip in the indictment, charging him as principal, whereon his life could not be in danger.

* 2 H. 259 260.

And here Mr. *Daly* begged leave to advert to the true principle of law:—Wherefore is it that a man ſhall not be tried a ſecond time for the ſame offence? For this reaſon alone, that his life ſhall not a ſecond time be put in jeopardy for the ſame offence. But in the preſent inſtance the evidence which affected Foy could not have been given againſt him upon the former indictment; there it would not have been legal evidence. How then can he affirm that his life was in jeopardy, and can he ſay that he was acquitted of the ſame offence as that with which he is now charged, when the very evidence by which it is meant to ſupport the preſent indictment would have been rejected, if it had been offered againſt him on the former occaſion. If a perſon be convicted, and there is error on the face of the record, and the proceedings are ſet aſide by motion in arreſt of judgment, yet he is liable to be tried again, becauſe the law conſiders him as never having been put in jeopardy. Where the reaſon is the ſame, the law muſt be the ſame: Otherwiſe the law, inſtead of being the guide of men's conduct, would anſwer no other purpoſe, but

but that of leading them into error and abſurdity. Again, no perſon would be abſurd enough to ſay, that one and the ſame offence is at the ſame time entitled to clergy and excluded from it; but a ſtatute by excluding principals from their clergy, does not thereby exclude acceſſories before. If this be admitted to be law, and at the ſame time it be ſaid, that thoſe offences are the ſame, manifeſtly this abſurdity follows—if thoſe offences are the ſame; Principal and Acceſſory muſt be ſynonymous terms, and this act of parliament by naming one muſt exclude the other as a term comprehending the ſame idea; and yet the law is moſt clearly otherwiſe, and that from the diſtinction it draws between the two offences. 2 Hawk. 327.

But admitting for a moment, the poſition he was contending againſt, to be found law, he ſaid it did not affect the preſent queſtion at all—For the act of 10 Hen. VII. which makes murder high treaſon in this country, has formed the moſt marked difference between the offence of procuring a murder and that of actually committing the fact. He admitted that if the ſtatute had ſaid generally, that whoever ſhall commit murder ſhall be a traitor, without going any further, that then the procuring a murder would by implication of law become high treaſon of a derivative nature, dependent upon the principal fact. But the ſtatute is not content with this, for it goes on and ſays, " Or of the ſaid malice ſhall procure any perſon to commit a murder, &c." and by this means makes the procuring, &c. a ſubſtantive and diſtinct high treaſon from the actual perpetration. And this, he relied upon, was the true conſtruction, for it is an eſtabliſhed maxim, that the legiſlature does nothing in vain; but if it be ſaid, that the procuring, &c. is a derivative and not a diſtinct and ſubſtantive high treaſon, the ſtatute containing an expreſs clauſe reſpecting procurers,

curers, receives the ſame conſtruction which it would bear, had that clauſe been omitted, and thus make the legiſlature which is held "*nil agere fruſtra*," to adopt nugatory and uſeleſs expreſſions—He was aware that it would be urged that ſtatutes making offences felony, generally name procurers and ſoforth, and yet that it never has been contended, that the acts of parliament by naming procurers, have made the offences of procuring diſtinct felonies—This he admitted, and the reaſon was plain, becauſe procurers are named in thoſe ſtatutes for the expreſs purpoſe of ouſting them of clergy—there the legiſlature, in naming procurers, has an end in view; but where a ſtatute makes the principal offence high treaſon, it can never be ſaid that it names procurers for the purpoſe of excluding them from clergy; for that was ſufficiently done without naming them, by making the principal offence high treaſon—That argument therefore can have no weight in the preſent caſe; and he would only add that if the act of 10 Hen. VII. did not name procurers for the purpoſe of making them diſtinct and ſubſtantive traitors, he confeſſed himſelf ignorant of the purpoſe for which it did name them. Upon the whole of this caſe, therefore, he truſted the Court, adhering to the true principles of reaſon and law, would determine that he who procured another to commit a murder was guilty of an offence totally diſtinct from that of the perſon whom he procured to commit the fact, and of courſe would direct the Jury to find a verdict for the crown.

[Here the Counſel for the Crown cloſed their arguments.]

Mr. *Charles O'Hara* ſaid, he was of counſel for the priſoner at the bar, and that he was very glad he had inſiſted on it, that the gentlemen on the other

other ſide ſhould begin, for otherwiſe he ſhould have gone over very different ground than that which they had now compelled him to take. They had replied to the plea, and joined iſſue on the fact, "Whether the murder in the preſent indictment "was the ſame murder of which the priſoner at "the bar had been before acquitted," but they had argued upon the plea as if they had demurred to it. He relied upon it that the Jury, after having heard the two indictments read, could have no difficulty to determine that the two indictments were for the ſame murder; and he would follow the gentlemen in their argument. They had conſidered the preſent indictment, firſt as the indictment of an acceſſory, and ſecondly, as the indictment of a principal, denying that the plea was good in either caſe, whereas, he ſaid, he would give them their choice in which light he ſhould argue the plea, or ſhew them that it is good in both: that he would conſider the priſoner firſt, as indicted for an acceſſorial offence, and that he was happy the point was to be decided by his Lordſhip, becauſe in whichever way he ſhould determine it, he was convinced both the bench and the bar would acquieſce. He ſaid the diſtinction is of infinite conſequence to the priſoner at the bar, and to every man who ſtanding a trial for his life might poſſibly be conſidered as an acceſſory. The acceſſory enjoys infinite advantages over the principal in the courſe of trial; he has a right to enter into the full defence of the principal, and avail himſelf of every point of law and matter of fact tending to his acquittal; and if both principal and acceſſory be convicted and attainted, the reverſal of the attainder of the principal ſhall reverſe the attainder of the acceſſory. His guilt in the eye of the common law depends ſo much upon the guilt of the principal, that by the common law he could not be arraigned till the principal had been attainted,

and ſo peremptory and decided is the rule of the common law in this particular, that the Judges of England did not dare to tranſgreſs it, even in the moſt reaſonable and neceſſary inſtances; without the ſanction of an act of parliament, ſixth of Anne, nor will at this inſtant call the acceſſory to trial, till they have attainted the principal, except in the circumſtances particularly mentioned in that act; circumſtances under which it is impoſſible the prinpal can ever be attainted. Theſe (he ſaid) are inеſtimable privileges to the acceſſory, and ſuch as his Lordſhip would not allow him to be deprived of by any inconſiderate conſtruction of the ſtatute; they are not only privileges by the common law, but are confirmed by the ſtatute, for it is declared by Weſt. 1. chap. 15, "That no man ſhall be out-"lawed upon appeal of commandment, force, "aid, or receipt, until he who is appealed of the "deed be attainted;" in which the word *appeal* is ſaid, by Lord Coke, to mean accuſation generally, whether by indictment or by bill, and the ſtatute to be in affirmance of the common law, and in Lord Sanchar's caſe, he ſhews the abſurdity were it otherwiſe; for ſays he, "if an acceſſory were "tried, convicted, and executed upon the out-"lawry of the principal, and the principal were "afterwards to come in, reverſe the outlawry, and "plead to the indictment and be acquitted, this "*ipſo facto* reverſes the attainder of the acceſſory." The caſe actually happened in the reign of Edward the fourth, but though the fortune was preſerved to his heir, the acceſſory could not be reſtored to life. Blackſtone and Foſter, as well as the very earlieſt writers, confirm the rule of the common law, that the acceſſory ſhall not be tried till the principal has been firſt attainted. He ſaid he preſſed this rule the more upon the Court, becauſe it would help to diſtinguiſh whether the preſent

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caſe would admit of principal and acceſſory or not; for if the nature of any caſe were ſuch, that the crime of one man depended upon the crime of another, ſo as to require in juſtice and prudence, that the guilt of the one ſhould be aſcertained before you put the other upon his defence; that you may rely upon it, that the diſtinction of principal and acceſſory exiſts in the nature of the offence, and that he who ſtands in the nature of an acceſſory ought to be indulged with all the privileges which the law gives him for the defence of his life; and among theſe privileges he is particularly entitled to that of pleading *auterfois acquit*, where he has already been acquitted as principal.

He ſaid he was aware of the maxim, "that all are principals in high treaſon," but he did not conceive it would apply in the preſent caſe. He ſaid it is a maxim in England, where there is no ſuch act as that of Henry VII. that it is univerſally true as to the puniſhment when ſentence is to be pronounced, but is by no means true as to the proceedings during the courſe of the trial: That it relates particularly to treaſons againſt his Majeſty's perſon and government, the nature of which is ſuch as almoſt to exclude acceſſorial offences, becauſe every overt act towards the murder, or dethroning of the King, is in itſelf high treaſon, though the intention of the traitor ſhould fail; whereas no man could commit high treaſon in the murder of another, unleſs murder was actually perpetrated—That Blackſtone therefore in his fourth commentary is clearly right, where he ſays the maxim that all are principals in high treaſon againſt the King's perſon, will not hold in the inferior ſpecies of high treaſon; which is as full in point to the preſent caſe as if it were intended for a comment on the Iriſh act.

He ſaid the gentlemen on the other ſide ſeemed to forget for a moment the language of acts of parliament, when they argued that the words of the ſtatute precluded acceſſories. The words of the ſtatute are "If any perſon of malice prepenſe, do ſlea, or of the ſaid malice provoke, ſtir, or procure any other perſon to ſlea one of the king's ſubjects, he ſhall be deemed traitor attainted, &c." Theſe are very much the words by which acceſſories are deſcribed in all other acts of parliament, for if gentlemen will look for the word acceſſories, it is hardly to be found in the ſtatutes. The import of the word is well known, but the ſtatutes always deſcribe the offence there. He cited the deſcription of acceſſories from various acts of parliament, as thoſe who comfort, abet, or aſſiſt, or thoſe who counſel, procure, aid or abet, and ſaying that all theſe are but definitions of the acceſſory, and that in no one of theſe could you try him who had adviſed or procured till you had attainted him who had committed the crime, for though they all of them, like the act of Henry VII. inflict the ſame puniſhment upon the acceſſory as upon the principal, whether that of high treaſon or of felony without benefit of clergy, yet no one of them ſhall be ſaid to remove the diſtinction between principal and acceſſory during the time of trial. That 10th Hen. VII. was ſatisfied if the penalties of high treaſon were inflicted upon every perſon concerned in a murder when convicted; but that it would be a ſtrange conſtruction of a penal law to ſay, that words which mean the acceſſory in other ſtatutes, ſhould denote the principal in this, for the purpoſe of depriving the priſoner at the bar of his common law mode of defence. That if the words of the ſtatute could bear a doubt, Mr. Serjeant Hawkins had furniſhed an explanation of them, 2d. Hawk. P. C. chap. 29. Sect. 7. where

where he ſays, if a ſtatute conſtitute an offence high treaſon, it does not by conſequence make all perſons principals: That there are no better rules for expounding ſtatutes than reaſons and principles of the common law; and that it is a principle of the common law that no *particeps criminis* can be more than an acceſſory before the fact, unleſs he be preſent at the fact. That if the authority of an act of parliament be required, Weſt. 1. is ſtrongly in point. He therefore contended that every principle of law, and every authority, were againſt the idea that the words of the ſtatute precluded acceſſories.

He ſaid that if the words "likewiſe, as it ſhould extend to our Sovereign Lord's perſon" were argued to have any weight, there are not wanting very great authorities to ſhew that even in treaſons againſt his Majeſty's perſon, he whoſe guilt depends upon the guilt of another ought not to be brought to trial till the fact has been firſt eſtabliſhed by the attainder of the principal offender. For this he cited Hale's chapter *of principals and acceſſories in high treaſon*, and Foſter's crown law; and argued, that if the diſtinction between principal and acceſſorial offences could find a place in high treaſon againſt his Majeſty's perſon and government, much more ought it to be admitted in high treaſon under 10th Hen. VII. which has nothing in its nature of high treaſon, no breach of fealty, nor of the oath of allegiance, no diſloyalty to the prince or government, but was merely made high treaſon by the words of the ſtatute, for the purpoſe of inflicting the puniſhment of high treaſon.

He ſaid he hoped he had by that time made it plain, that there is nothing in the words of the ſtatute which ought to prevent the priſoner at the bar from being conſidered in the light of an acceſſory, during every ſtage of the trial, till conviction.

And

And if ſo, the priſoner has a right to put in the plea of *auterfois acquit*, for though gentlemen had quoted Hale and Foſter's opinions, that the being acquitted as principal did not prove a man to be innocent as acceſſory, yet he conſidered both Hale and Foſter as authorities in his own favour; for notwithſtanding in their private opinion, the offences were diſtinct, yet they acknowledged it to be a ſettled point of law, under which they acquieſced. He ſaid the point appears by Keiling to be abſolutely ſettled, who in p. 26 ſays, "afterwards upon conſideration of the books, we did "agree that the law was, if one be indicted as "principal and acquitted, he cannot afterwards "be indicted as acceſſory before the fact." He alſo quoted Stamford's crown law, p. 105, as a book of great authority with Lord Coke, where it is declared, "that an acceſſory before the fact having been acquitted as principal, may plead *auter-* "*fois acquit*." And now, he ſaid, having eſtabliſhed the priſoner's right to this plea, when conſidered as acceſſory before the fact, he would proceed to ſhew that he is not leſs entitled to it if conſidered in the light of a principal, who has been already acquitted on an indictment under the act.

He ſaid, gentlemen in order to ſhew that a man may be twice indicted as principal, argue that there are two crimes made high treaſon by the act, viz. the procuring the murder to be committed, and the committing it *manu propriâ*. But, he ſaid, the crime is in both caſes the ſame, viz. murder made high treaſon by this act, the difference only conſiſting in the mode of accompliſhing it. The proſecutor has his choice in which way he will frame his indictment; but if the priſoner be acquitted of the treaſon and murder, he may plead that acquittal in bar of a ſecond indictment. The

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profecutor has ſufficient advantage in the various modes of profecution opened to him by the act, but if he take the wrong mode, and the criminal be acquitted of the treaſon and murder, the profecutor is not at liberty to begin again. If an indictment be wrong it may be quaſhed, and a new one ſent up; but however ill-founded the indictment may be in point of fact, if no error appear upon the face of the record, and the priſoner have ſtood his trial upon it and been acquitted, he cannot be tried again under a different indictment. For example, if one be indicted for murder committed with a ſword and acquitted, he ſhall not be indicted for the ſame murder by means of a dagger, a knife or other inſtrument. *Auterfois acquit* upon an indictment for murder would be a good bar to an indictment for petit treaſon. In ſhort, where the priſoner has been acquitted of a particular death and murder, you have no right to a new indictment for that death and murder, and to change your indictment as often as you pleaſe. If the profecutor had that liberty, what would be the conſequence? The priſoner confined in a dungeon, ſuffers every diſadvantage. The profecutor at large, conſults books and lawyers, and frames his indictment in the manner moſt likely to ſucceed. He ranges the country for evidence; or if after all, the poor confined criminal without books, without lawyers, without evidence be acquitted, what ſays the law? The law ſays he is acquitted for ever.—But what do theſe gentlemen ſay? No. Though innocent, he ſhall remain in gaol—though acquitted, he ſhall be tried again—his life ſhall be brought in jeopardy, aſſizes after aſſizes, till witneſſes can be found to accuſe, and a jury to convict him, or ſorrows and death in gaol relieve him from perſecution. Having now conſidered the indictment, firſt as that of an acceſſory, and afterwards as that

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of a principal, he ſaid he thought himſelf intitled to inſiſt that in either caſe the priſoner had a right to plead *auterfois acquit*.

Mr. *Williams*, on the ſame ſide, contended that the plea ought to be allowed; that whatſoever conſtruction the part of the act of the tenth of Henry the ſeventh might receive in *this* kingdom, by which the crime of murder appears to have a deeper die of enormity than in Great Britain, yet at all events the *nature* of the crime as known to the common law muſt continue unaltered, for though the legiſlature might *puniſh*, yet it could not *create* the crime. At common law then murder ſtood a *felony*, and as ſuch it admitted of degrees of guilt; it admitted of acceſſories, *before* and *after* the fact—the crime reflecting more or leſs guilt upon the party, in proportion as he ſtood nearer or more remote from its perpetration. This diſtinction originated in good ſenſe as well as humanity—"that "the accuſed might know how to defend himſelf," which is one of the reaſons aſſigned by Blackſtone, 4 com. 39. But in high treaſon the caſe became different for "*propter odium delicti*," the ſame acts that made the party but *acceſſory* in felony, conſtituted him a *principal* in *treaſon*, and conſequently merged all diſtinctions. Suppoſing then this caſe at common law, the priſoner has been already tried and acquitted of the actual perpetration of murder, and according to the opinions of Hale, P. C. 626, and Keiling 107, cannot now be indicted as acceſſory *before* the fact (being the offence charged in the indictment) ſince thoſe offences are ſo very nearly allied, that an acquittal of the *one* is *ſubſtantively* an acquittal of the other. The weight of authorities is with this poſition, and however great or reſpectable is the opinion of Sir Michael Forſter in his Caſes 361, yet it muſt give way to authority,

authority, that the law may be *aſcertained* for the ſafety of the ſubject. And it is obſervable that Forſter himſelf offers his opinion but as a doubt. Lord Coke's deſcription of the crime of murder, 3 Inſt. 47. ſtrongly ſupports this doctriue. " Mur- " der is when a man of ſound memory of the age " of diſcretion unlawfully killeth, &c. any rea- " ſonable creature, &c. with *malice* forethought, " &c.' *Malice* then is the eſſence of the crime and its inſeparable incident. Apply this definition of the crime to the priſoner's caſe. The priſoner here then having been tried and acquitted of *murder*, ſtands acquitted of *malice*, and is conſequently acquitted of the crime. Of what crime then does he now ſtand indicted?—of *procuring* a crime to be committed unaccompanied with *malice*, for a murder it cannot be, as a Jury of his country has found him innocent of malice, therefore the crime itſelf is now merged and gone as to the priſoner. Having eſtabliſhed this principle, he then contended that to diſallow the preſent plea would be to infringe another *principle* of law; " that no man ſhall be put in jeopardy of his life " *twice* for one and the ſame offence;" and that the priſoner having been already tried and acquitted of *the crime*, capital in its nature, and for which if found guilty he muſt have undergone the ſentence of the law, could not again be brought into a ſituation which the juſtice and humanity of the law of this realm abhor. As to the ſtatute of 10th Hen. VII. cap. 21. upon which the indictment is framed, it is remarkable that through the whole ſtatute, that the legiſlature has never once noticed the diſtinction of *acceſſories*, becauſe it was not intended to invade the province of the common law. It will be found to extend to the *puniſhment* only, and not to the crime. In the 3d chap. of the ſame act " the receptors and maintainers of rebels, as

" well as the actual rebel, are adjudged *traitors*—
" ſo in the 14th chapter, the procurers of war
" againſt the King, or if any perſon procure the
" Iriſhry to make war upon the Engliſh, ſhall be
" deemed *traitor attainted of high treaſon.*" The policy of the times required this act, and called down the vengeance of the then legiſlature, but neither the crime of murder or its degrees were either infringed by this act, or even in contemplation when it paſſed; it ſtill remains as at common law, and its nature cannot be changed. The conſtruction impoſed upon it by the counſel for the crown may be ingenious, but cannot be called ſatisfactory; it may perplex but cannot convince. If, as the gentlemen contend, there are two independent branches of the act, each of which (including the crime with which the priſoner ſtands charged) are now termed *ſubſtantive* treaſons, the counſel for the crown are the leſs excuſable in not indicting the priſoner properly on the ſecond branch mentioned in the act, ſeeing with ſuch perſpicuity as they do the diſtinction between the *two* branches; but if any ambiguity ſhould ariſe with regard to the conſtruction of this act, or the crime of which the priſoner ſtands charged, let it be remembered that it is not the principle of the laws of this realm to *extend treaſons*, and that in *favorem vitæ* the milder conſtruction ought to prevail, and mercy can with the more propriety be adopted in the preſent caſe, which in the criminal laws of the country (already too penal) is the more neceſſary to be extended.

Mr. *Ulick Burke*, of the ſame ſide.—If the gentlemen concerned for the crown will admit the law to be with the counſel for the priſoner, the gentlemen on his ſide would be content to make them a preſent of the reaſoning. All the books treating on this ſubject, declare

declare it to be agreed that an acquittal as principal is a bar to an indictment as acceſſory before the fact. No determined caſe can be cited where the Court overuled this plea in any ſimilar caſe; this doctrine in favour of the plea is laid down in Keiling, 25. Stanford's pleas of the Crown, 44, Hale P. C. 224. and 244, Cromp. Juſtice 42, but he would cite to the Court a late deciſion fully in point with the preſent caſe, it was the deciſion of the nine judges in the caſe of the King againſt Doherty: He was tried before Serjeant Wood at Roſcommon, as a principal in the murder of Lawder, he was acquitted, the evidence only going to ſhew him an acceſſory before the fact; he was aterwards, as in the preſent caſe, indicted as acceſſory before the fact, and pleaded the plea of *auterfois acquit*; the counſel for the Crown demurred and the demurrer was overuled. The caſe in 2 Edward III. is alſo in favour of the plea, and though Mr. Serjeant Hawkins ſays that caſe is inconſiſtent, the judges having ſaid [*we award you to go quit for example that a man may be tried twice*] yet in his humble apprehenſion the more probable concluſion would be, that the reporter had omitted the word *not* in the *ſentence*, or that ſuch miſtake happened at the preſs, rather than to ſuppoſe the judges ſpoke nonſenſe, and grounded their deciſion on a reaſon that militated againſt it. As to what had been inſiſted upon from Juſtice Foſter, he begged leave to ſay it was an argument in favour of the plea, for he admitted the law to be ſo eſtabliſhed, though he queſtioned the validity of the principles upon which that doctrine was founded; his reaſoning was extremly ſtrong to induce the legiſlature to alter the law in this point, but until the legiſlature made that alteration, judges muſt determine according to what is the law, though the principles be ever ſo unſatisfactory; judges will not uſurp the province

of the legiſlature ; it would be a dangerous precedent to admit a power to exiſt any where except in parliament to meddle with the ſhield of life, the criminal law. If ſuch an idea was to prevail, that part of the ſcience of the law (which it is moſt eſſential to the community to have clearly ſettled and aſcertained) would be at ſea, varying with the different opinions of different men. As to what had been urged reſpecting the ſtatute on which this indictment was framed, that the idea of an acceſſorial offence is excluded, a penal act ought not to be ſtrained beyond the letter, to ſtrip the ſubject of any advantages to be derived from the mode of trial. It never was conſidered that the act making murder high treaſon related to any thing more than the puniſhment ; it never operated on the intermediate ſtages of the trial. In a caſe before Lord Chief Juſtice Patterſon, the wife, on an indictment for murder, was attempted to be adduced as a witneſs againſt her huſband ; Mr. J. Kelly, then at the bar, objected upon the principle of the acts not altering the mode of trial, and his objection was allowed : He therefore hoped the Court would direct the Jury in favour of the plea, and he truſted they would not decide upon oath ſo difficult a point contrary to ſo able a direction.

Mr. *Stanley*, of the ſame ſide.—This comes before the Court upon a plea of *auterfois acquit*, put in by the priſoner upon his arraignment, on a bill of indictment found againſt him for procuring, ſtirring up, and provoking Andrew Craig, and ſeveral others, to murder Patrick Randal M'Donnell ; upon this ground, that the priſoner was at the laſt aſſizes of Caſtlebar tried upon an indictment found againſt him as a principal for having been preſent, and having aided and aſſiſted Andrew Craig to commit the act of murder, and that he was acquitted of that offence ; the plea itſelf is founded upon this humane

humane principle of the law, and maxim of univerſal juſtice, that no man is to be brought into jeopardy of his life more than once for the *ſame offence*. And therefore if a priſoner is once acquitted upon an indictment free from error, and before a Court having competent juriſdiction, he may plead that acquittal in bar of any future proſecution for the ſame crime, or for any fact which is ſo incidental to, or connected with the original act, as to amount in conſtruction of law to the ſame offence.

In his conception this plea involves in it two queſtions of very great and general importance.

1. Whether if a man be indicted as a principal and acquitted, he may plead that acquittal in bar to an indictment as an acceſſory before the fact in the ſame offence.

2. Whether the procurement of, or incitement to a murder is as the law ſtands in Ireland upon the foot of the 10th of Hen. VII. c. 21. an acceſſorial derivative offence, connected with and ariſing out of the principal offence of the murder: Or a *diſtinct ſubſtantive independant offence*.

As to the firſt queſtion, He took the law to be ſettled at this day, and admitted even by thoſe who ſeem to doubt the reaſon upon which the authorities are founded, that if *A* be indicted as a principal in felony, and acquitted, he may plead that acquittal in bar to an indictment, as an acceſſory before the fact, for the offences are in conſtruction of law ſubſtantially the ſame; and an acquittal of the principal fact draws after it every degree of guilt precedent to, or concomitant with that act. And there is not a ſingle writer upon crown-law, from the 2d of Ed. III. to the preſent time, that does not agree that the law has been ſo held from that time to the preſent. Lord Hale, 1 vol. 626. Stamf. fo. 105. 2 Hale 244. Keiling 25, 26. all agree in the point. The only two writers upon the

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crown-law, that have expreſſed a doubt upon the ſubject, are Serjeant Hawkins and Mr. Juſtice Forſter; and even they admit the law is ſettled, although they ſubmit their own doubts upon the principle upon which the law is founded: and their doubts are founded upon this reaſon, *that a perſon indicted as a principal, cannot be convicted upon evidence tending barely to prove him an acceſſory before the fact*; and therefore that an acquittal as a principal ought not to operate as a bar to an indictment as an acceſſory before the fact. That is the ſingle reaſon upon which the doubts of Forſter and Hawkins are founded, contrary to the uniform opinion of all the crown-law writers. But that reaſoning will be found upon examination to be inconcluſive, and to be inconſiſtent with what both theſe learned writers lay down in other parts of their works: for they both agree, that if a man is indicted of murder, and it ſhould come out in evidence that he ſtood in that ſort of relation to the deceaſed, which rendereth that offence petit treaſon, the priſoner cannot upon that evidence be convicted upon that indictment for murder; and yet they both agree, that *autrefois acquit* upon an indictment of murder, would be a good bar to an indictment for petit treaſon for the ſame fact, Foſter 329. And it was for that reaſon that, in the caſe of the King againſt Swan, Foſter 104. when a bill of indictment was found againſt the priſoner for murder, the Attorney-General being ſatisfied, from the evidence that his offence amounted to petit treaſon, preferred a new bill againſt him for petit treaſon, upon which he was tried; and conſented that the bill of indictment found againſt him for murder ſhould be quaſhed; becauſe he knew that if he had been tried upon that indictment, he could not have been convicted of murder upon evidence which tended to prove him guilty of petit treaſon;

treaſon; and yet he knew that notwithſtanding an acquittal upon that indictment for murder would have barred another indictment for petit treaſon. And if the Attorney-General who conducted the proſecution againſt the priſoner, at the laſt aſſizes, had followed the example of the Attorney-General who conducted the proſecution againſt Swan, and had taken care to be apprized of the nature of the evidence againſt Foy, and to have adapted the indictment againſt him to the truth of the fact, he would have conducted himſelf in a manner moſt conformable to juſtice and humanity, and he would not have expoſed the unfortunate priſoner to the danger of being harraſſed with two proſecutions for one and the ſame fact.

The gentlemen who have argued this caſe on the part of the proſecution, although they admit that the law is ſettled, that *auterfois acquit* as a principal is a good plea to an indictment as an acceſſory before the fact, yet ſaid they could ſee no reaſon for it. But he would anſwer them by ſaying, that there was a kind of artificial reaſon in the law, which is ſometimes different from common reaſon, but which is founded upon the wiſdom and determinations of ages, to which it is ſafer to adhere in all caſes, than by deviating from it in one inſtance, to introduce general incertainty and confuſion.—And further, he would tell them that modern experience has fully ſhewn that altering the old land-marks of criminal juſtice may be converted into the moſt dangerous engines in the hands of crafty and ſubtle politicians; and upon this principle of political wiſdom and juſtice it was that the judges of Ireland, in a modern caſe, determined that although the reaſoning in Forſter upon the ſubject was ingenious, yet they would not overturn ſettled and eſtabliſhed precedents, and allowed a plea of *auterfois acquit* as a principal to an indictment as an acceſſory before the fact in the ſame burglary. The caſe was the King againſt

againſt Doherty; he was indicted at Spring Aſſizes for Roſcommon in 1779, *as a principal for burglary* and robbery in the dwelling-houſe of James Lawder, Eſq. He was tried before the late Lord Chief Baron Burgh, then Prime Serjeant, and it appeared in evidence that he was not preſent at the fact, but that he incited and procured ſeveral others to commit it. The Judge directed the Jury to acquit the priſoner upon that indictment, and he ſent up a new bill againſt him as an acceſſory before the fact; to which the priſoner pleaded *auterfois acquit*. The plea was argued, and went up for the opinion of the Judges. And at the ſucceeding Summer Aſſizes Serjeant Wood delivered the opinion of the Judges, that the plea was a good one, and the priſoner was diſcharged from that indictment. This caſe was reported to him (Mr. Stanley) by Mr. Robert French, who was counſel for the priſoner in that caſe: and the records have been ſearched, and agree intirely with Mr. French's ſtate of it; and he had a copy of that plea in his hand. And although, from theſe documents which he had taken care to ſearch and procure, it clearly appeared that it was not a caſe of an indictment for murder, as ſtated by Mr. Burke; and that in truth no ſuch caſe as ſtated by him exiſted; yet he would, by and by ſhew that the principle which governed the deciſion of that caſe, muſt govern and prevail in the preſent. Thus therefore he thought it manifeſtly appeared by all the authorities, from the 2d of Edward III. to the preſent day, that the principal and acceſſorial offence before the fact are in judgment of law ſo connected together, and the degrees of guilt ſo near, that an acquittal of the principal fact is an acquittal of all incidents which preceded or accompanied the ſuppoſed criminal fact, although it does not operate as an acquittal of that degree of guilt which is ſubſequent to the original and principal crime.

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The next and the great queſtion upon which this caſe muſt turn is, whether the offence of the priſoner, as ſtated in the indictment, falls within that rule, or is to be governed by that principle; or in other words, whether the perſon who is indicted for procuring a murder in Ireland is an acceſſory before the fact to the original murder, or in the nature of an acceſſory before the fact; or, whether he is a diſtinct, original ſubſtantive offender, unconnected with and independant of the guilt of the perſon or perſons who commit the act of murder itſelf, or who are incited by him to do ſo: That is the queſtion upon which this plea muſt depend; for moſt clearly if procuring a murder is a diſtinct original offence, both in fact and in ſubſtance, from the committal of the murder itſelf, the preſent plea (the very giſt of which is that the offences are ſubſtantially the ſame) muſt fall to the ground; and all reaſoning upon the doctrine of principal and acceſſory is totally inapplicable.

Whether the offence of murder continues, as it was at common-law, felony, but with the penalties of treaſon ſupperadded to the offence by the 10th of Henry VII. or whether the offence of murder is made high-treaſon by that ſtatute, he held the procurer of the murder to be merely an acceſſory before the fact in the one caſe, or an acceſſorial derivative traitor in the other; and conſequently that in either caſe the plea is a good one.

This ſtat. of 10th Hen. VII. has in modern times been refined upon with many elaborate and ſubtle diſtinctions, and a conſtruction has been tortured from it which neither the words nor the true meaning of the act will warrant.

He conceived that the offence of murder was in no reſpect altered by the 10th of Henry VII. except as to the puniſhment; but that the offence itſelf ſtill remains felony to all other intents and

purpoſes, and partakes of all the qualities and incidents of felony; and this he would endeavour to prove,

1. From the reaſon and words of the act.

2. From the determinations of courts of juſtice upon the conſtruction of the act.

3. From the uniform expoſition of the legiſlature itſelf, from the time the act was made to the preſent day.

And, 1ſt, as to the reaſon and words of the act: At common-law the offence of murder was clergyable in England and Ireland.——In England the privilege of clergy was taken away from the principals in murder, by 23 Henry VIII. and 1 Ed. VI. and 4 & 5 Philip and Mary, took away clergy from thoſe that council, hire or procure another to commit murder.

In Ireland the frequent jealouſies and feuds between the Engliſh of the pale and the original natives, and the homicides that they produced, rendered it neceſſary to take away the privilege of clergy much earlier; but it was found no eaſy matter to prevail on the clergy, who had ſo conſiderable a ſhare of power in the ſtate, to part with an exemption which they claimed from ſecular puniſhment, even for murder itſelf: and therefore the legiſlature of that day indirectly and by a ſide-wind took away the *privilegium clericale* from murder, by the act of 10 Henry VII. c. 21. which enacts, "that if any perſon ſhall of malice prepenſed ſlee "or murder, or procure, or provoke any other to "do ſo, he ſhall be deemed traitor, like as it ſhould "extend to the King's perſon." There is not a word in the act which makes the offence of murder high-treaſon; and ſo high an offence cannot be created by inference or argument. Lord Hale,

1 vol.

1 vol. 327. upon the conſtruction of the Engliſh acts of 5 & 18 Eliz. relative to the coin, ſays, they are new treaſons, by reaſon of the ſpecial penning of the act that *ſuch offences ſhall be high treaſon.*

It has been contended, that becauſe the act of 10 Henry VII. extends by expreſs words to the procurer of a murder, and enacts that the perſon who commits the murder, or procures another to do ſo, ſhall be deemed a traitor *as againſt the King's perſon*, that therefore the act, by analogy and inference, makes the procurement of a murder a diſtinct ſubſtantive treaſon, and puts it on the ſame footing as treaſon in compaſſing the death of the King, in which ſpecies of treaſon it is not neceſſary that the perſon incited, or who undertook to perpetrate the act, ſhould be convicted before the trial of the perſon who incited him to do ſo.

But it will require very little argument to prove the weakneſs of this reaſoning, and the fallacy of this conſtruction.

The object of the act of parliament clearly was to take away clergy from the perſon who committed the murder, and who procured him to do ſo. And therefore it enacts, that he ſhall be deemed traitor *as againſt the King's perſon.* At common-law high treaſon was ouſted of clergy in all caſes; but the ſtatute *de Clero*, 25 Ed. III. c. 4. extended the privilege of clergy to all treaſons, except *treaſons againſt the perſon of the King or his royal Majeſty.* In conſequence of this ſtatute all new treaſons againſt the perſon or majeſty of the King were excluded of clergy without expreſs words; but when offences of a private nature, which for the moſt part terminate in an injury done to particulars, have been made high treaſon, or whenever the legiſlature has thought fit to annex the penalties of treaſon to the offence of felony, it has been always

held neceſſary to take away clergy by expreſs words, or by ſome words which come within the exception of the ſtatute *de Clero*, Forſter 191; this therefore accounts for the words of the 10th of Hen. 7. "that the perſon who commits the "murder, and procures him to do ſo, ſhall be "deemed traitor *as againſt the king's perſon*, in or- "der to deprive the offenders of clergy, and to "bring them within the exception in the ſtatute "*de Clero*, and not to make the procurement of "a murder the ſame offence in all reſpects, and "to all intents and purpoſes, as compaſſing or "imagining the death of the king." In his conception the meaning of the act was this, perſons convicted of murder or of procuring it, ſhall be puniſhed as traitors *againſt the perſon of the king*; that is, ſhall not have the benefit of clergy within the ſtatute *de Clero*.

Great ſtreſs has been laid on the words of the act of parliament, "If any perſon ſhall murder, or "*procure, ſtir up or provoke another to do ſo*," that it makes the procurement a diſtinct original offence. Lord Coke in his commentary on W. 1. ſays, that theſe words plainly import no more than acceſſories before the fact. He ſays that an acceſſory before the fact, is he that being abſent doth yet *procure, ſtir up* or counſel another to do it; and yet it might with equal colour be contended, that every act of parliament creating a felony which extends by expreſs words to the procurers, makes the procurement of the felony an original diſtinct offence, and not an acceſſorial one, as to contend that becauſe the act of 10 Hen. VII. extends to the procurer, that therefore it makes the procurement of the murder an original, and not a derivative acceſſorial offence. The ſtatute of 4th and 5th Ph. and Mary in England, enacts, that if any perſon ſhall command, procure, or counſel another to commit a mur-

murder, he ſhall be ouſted of clergy ; and yet it never was contended in England, that the procurer of a murder was guilty of a ſubſtantive independant felony, or could be tried until the perſons who committed the murder or ſome of them were convicted ; and he knew of no different rule of conſtruction for words in acts of parliament creating treaſons, (ſuppoſing the offence of murder to be treaſon) from that which prevails in the conſtruction of acts creating felonies, except that in the caſe of treaſons, where in general the whole weight and power of the crown is levelled againſt the ſubject, the conſtruction ought to be infinitely more beneficial and liberal in favour of the ſubject.

2dly. Judicial determinations prove that murder is ſtill felony, *quoad* the trial. It has been held that a wife could not be a witneſs againſt her huſband in murder, although ſhe is a competent witneſs againſt him in high treaſon ; this point was ruled by Lord C. J. Paterſon, at Sligo aſſizes, in a caſe wherein Mr. Juſtice Kelly, when at the bar, was counſel for the priſoner, and made the objection, that the ſtatute of 10 Hen. VII. made murder treaſon only *quoad* the puniſhment, and not *quoad* the offence, and the objection was argued by him and allowed.

3dly. Murder has always been conſidered felony by the legiſlature, and treated as ſuch by a number of acts of parliament relative to that offence. At common law, if a man were acceſſory to a murder in a different county than where the principal murder was committed, he was diſpuniſhable in either. To remedy this inconvenience, it is enacted by the 10th Ch. I. c. 19. " That the *acceſſory in murder* is " indictable in the county where he was acceſſory, " and ſhall be tried there as if the principal murder " was committed in the ſame county, and that the " juſtices before whom the *acceſſory in murder* ſhall " be

" be indicted, ſhall write to the Clerk of the Crown " of the county where ſuch principal in murder " ſhall be attainted, to certify the record of attain- " der, and that upon ſuch certificate the juſtices " ſhall proceed to the trial of the acceſſory in mur- " der, as if the principal offence and acceſſory had " been committed in the ſame county." This ſtatute proves two things:

1. That murder was ſtill conſidered felony *quoad* the trial.

2. That the law required the record of the conviction of the principal in murder, before the acceſſory to the ſame murder could be tried; in like manner the ſtatute of Hen. VIII. limits the number of peremptory challenges to twenty in high treaſon, petit treaſon, murder, &c. deſcribing murder as an offence contra-diſtinguiſhed from treaſon. It is well known that ſtanding mute in high treaſon always amounted to a conviction of the treaſon.—In felony the priſoner was condemned to penance, or the *peine forte* and *dure*; and yet from the 10th of Hen. VII. down to the 13th and 14th Geo. III. perſons who ſtood mute on their arraignment for murder were treated as felons, and condemned to the *peine forte* and *dure*; and ſo the law was held to be for a long ſucceſſion of ages, until the 13th and 14th of Geo. III. c. 16. ſec. 1. enacted, that if any perſon on his arraignment for *murder* ſtands mute, ſuch perſons ſhall be convicted. He thought, therefore, he was warranted in ſaying, that in the opinion of all the judges and lawyers from the time the ſtatute of Hen. VII. was made to the 13th and 14th Geo. III. the offence of murder was conſidered to partake of all the qualities and incidents of felony, in all the intermediate ſtages of the proſecution 'till conviction; that perſons who ſtood mute in murder were dealt with as felons, and not as traitors; and that at length the evil was remedied by a

ſpecial

ſpecial act of parliament, made in order to give a quality to murder, which if it was conſidered to be high treaſon by the ſtatute of Hen. VII. would have been an inſeparable incident to it. The gentlemen on the other ſide had quoted the caſe of the King againſt Mr. Fitzgerald, as an authority to prove that the procurer of a murder is a diſtinct, ſubſtantive original offender; and that in conformity to that principle, Mr. Fitzgerald was tried and convicted for procuring Andrew Craig, and ſeveral others, to murder Mr. M'Donnell, although neither the ſaid Andrew Craig, nor any one of the other principals in the murder, were at that time tried or convicted of any ſuch crime. He believed there is no man exiſting who entertains higher ſentiments of honour and reſpect for the very great and able judges who preſided at that trial than he did, and had not that caſe been relied on on that ſide, and did he not feel it abſolutely neceſſary for the defence of the priſoner to enter a little into the principles and grounds which governed that caſe, he ſhould not have wiſhed even to glance at it, or to attempt to combat the opinions of men whoſe abilities and knowledge are ſo ſuperior to the ordinary claſs of mankind; but taking it for granted, that he might in a caſe of this nature make ſuch obſervations as his poor underſtanding enabled him to do on the merits of that caſe, without being ſuppoſed to forget the very high reſpect and deference he had for the opinions of ſuch men, he begged leave then to ſay, that in his humble conception the principles laid down by the learned judges in their charge to the jury, and in the ſubſequent ſtages of the trial, in the caſe of Mr. Fitzgerald, was a deciſive authority with him, to ſhew that procuring a murder is an acceſſorial offence, derived out of, and connected with the guilt of the perſon who commits the homicide, and conſequently that the procurer ought

ought not to have been tried in that caſe, until ſome of the principals in the murder were convicted.

He did admit that Mr. Fitzgerald was put upon his trial on an indictment for procuring the murder, although none of the principals had been tried or convicted, and he did admit that the learned judges who preſided in that caſe did overrule the objection that was made to that proceeding, not upon the ground, as he conceived, of the objection not being made in time, for he did aver, and it is well known to every man who was preſent at that trial, that he made the objection before a ſingle juror was called or ſworn, and that he was told he was premature in the objection at that time, but ſhould be heard in ſupport of it; and therefore ſuch a weak and flimſy ground, unſupported by fact, never could have been the foundation of the opinion of the learned judges, eſpecially when it is conſidered that in that and every other privilege which the law allows the ſubject in caſes of life, no implied or preſumptive waiver, or any thing leſs than an *expreſs* renunciation of it can deprive the ſubject of the advantage of it, or be tortured into a conſent; neither could his Majeſty's Attorney General's refuſing to diſcharge the jury have any weight whatſoever to juſtify that proceeding; although, he ſaid, he believed there was no inſtance before, wherever in a caſe of life, the king's Attorney General had refuſed his conſent to give a legal benefit to the priſoner; for, beyond any doubt, if the learned judges thought that the objection was right in principle, they would have appriſed Mr. Fitzgerald of the privilege which the law allowed him, and they would *have diſcharged the jury by their own authority*, as has often been done in caſes of that nature; they need not have aſked the conſent

ſent of the Attorney General at all, as Mr. Juſtice Foſter ſays in his report 106, " *the juſtice of the* " *caſe would have been a ſufficient warrant for diſ-* " *charging that jury*," and proceeding upon the trial of the principals in the uſual and ordinary courſe; but their Lordſhips did think fit to overrule the objection upon much more manly and liberal grounds, viz. upon the ground that the procurer of a murder is a ſubſtantive diſtinct traitor, whoſe offence has no neceſſary connection with, or dependance upon the guilt of the perſon who committed the homicide; yet he thought it moſt manifeſtly appears by the principles laid down by the judges a few hours after in their charge to the jury, that procuring a murder is an acceſſorial and not an original ſubſtantive offence, and that the guilt of the procurer has a neceſſary dependance upon the guilt of the perſon who is ſuppoſed to have committed the murder, for the learned judges told the jury in their charge, that they muſt be ſatisfied of two things:

1. " That a *murder was committed*, and commit- " ted *by the principals*, or ſome of them."

2. " That the priſoner, Mr. Fitzgerald, procured " or incited them to do ſo, for 'ſaid the judges,' if " you believe that no murder was committed, or that " the offence of the principals amounted only to " manſlaughter, or juſtifiable or excuſable homi- " cide, you muſt acquit Mr. Fitzgerald for procur- " ing them to commit a murder." Did not that ſhew to demonſtration that in the opinion of thoſe learned judges, the guilt of the perpetrators of the murder muſt be aſcertained before the crime of the procurer could be eſtabliſhed; or in other words, does not it clearly ſhew that the procurer of a murder was merely an acceſſory before the

fact, or in the nature of an acceſſory, ſuppoſing murder to be high-treaſon by the ſtatute; for if the inciting and procuring another to commit a murder was in itſelf a ſubſtantive offence, the guilt or innocence of the perſon incited could have no influence whatſoever upon the crime of the inciter or procurer. But the learned Judges in Fitzgerald's caſe, well knew that in manſlaughter and in excuſable and juſtifiable homicide there can be no *acceſſories before the fact*; becauſe in judgment of law thoſe kinds of homicides are ſudden and unpremeditated: and upon that principle it was that they charged the Jury to acquit Mr. Fitzgerald of procuring them to commit a murder, if it appeared that the offence of the principals amounted only to manſlaughter or excuſable homicide; ſo that by trying Mr. Fitzgerald firſt the whole order of criminal juſtice was inverted, and the guilt of the perſons accuſed as principals of committing the murder was in effect tried, and decided upon by the Jury in Mr. Fitzgerald's caſe, contrary to all precedent and principle, in their abſence, when they had no opportunity of defending themſelves; altho' they were in cuſtody and amenable, they were brought to their trial the day after, with all the prejudice of a deciſion upon their guilt the day before. But farther, the Judges treated Mr. Fitzgerald after his conviction as an acceſſorial offender; for they did not paſs ſentence upon him 'till ſome of the principals who committed the murder were convicted, becauſe the acquittal of the principal would annul the conviction of the acceſſory. He did think, therefore, the principles laid down in Mr. Fitzgerald's caſe ſtrongly and directly militate againſt the determination in that caſe; and that thoſe principles ſo laid down are a deciſive authority for the plea. He had hitherto argued this caſe, as if the ſtatute of 10 Henry VII. did not alter the

the *offence* of murder, or the qualities and incidents inſeparable from that offence; but he would ſuppoſe it to be high treaſon to all intents and purpoſes, by the ſtatute of 10 Henry VII. Although the rule is clear, that in high treaſon there are ſtrictly no acceſſories, but all are principals in the final end and iſſue of the proſecution, yet it is equally clear by all the authorities, that the principal in the ſecond degree in treaſon, who adviſes or procures another to commit any other ſpecies of treaſon, except againſt the perſon of the King, is merely an acceſſorial offender; that his guilt has a neceſſary connexion with and dependance upon the guilt of the perſon who is the principal in the firſt degree and commits the act of treaſon itſelf; that he ought never to be put upon his trial 'till the guilt of the principal in the firſt degree in treaſon was legally aſcertained by conviction or outlawry; and that in mere acceſſorial and derivative treaſons the very ſame equitable rules and principles do prevail that are applicable to the caſe of the principal and acceſſory in felony. This doctrine, which was ſtrongly relied on in the caſe of Mr. Fitzgerald, is ſupported by the authority of all the antient and modern writers on the crown-law; and he did not believe that there was a ſingle caſe or authority, or dictum to be found in any book or precedent, antient or modern, wherever that doctrine was over-ruled or even diſputed, but in the caſe of the Lady Alice Liſle and George Robert Fitzgerald; the attainder of the former was reverſed in parliament; time only will prove what would be the fate of the latter. Lord Hale, 1 vol. 230, 233. and Mr. Juſtice Forſter, in his Diſcourſe on Accomplices in Treaſon, clearly prove that the procurer of a treaſon is merely an acceſſorial offender, and is intitled to the ſame legal privileges

and advantages to all intents and purpoſes that the mere acceſſory in felony is. Two of the moſt valuable of thoſe advantages are, that the acceſſory cannot be tried 'till the principal is convicted, and that an acquittal as a principal is a bar to an indictment as an acceſſory before the fact. And upon the whole, whether the procurer of a murder is an acceſſory before the fact in felony, or an acceſſorial derivative offender in treaſon, he truſted that the ſame rule and principle would apply to each, and that the Jury under the direction of the Court would find, that the offence of the murder and of procuring it are, in legal conſideration, the ſame offence in ſubſtance; and that, of courſe, the priſoner would be diſcharged from the preſent indictment.

Mr. *Owen*, on the ſame ſide.—The queſtion before the Court, new and important as it may appear at this day, was in his apprehenſion very plain and obvious. It had indeed been ſo ably argued by the gentlemen concerned for the priſoner, who went before him, that it would be treſpaſſing on the patience of the Court and the time of the public, to trouble it with a repetition of arguments that have been already made by the gentlemen on the ſame ſide with him; for, in fact, they had exhauſted the ſubject. He ſhould therefore be as brief as poſſible in his obſervations on it; and firſt, he ſuppoſed the crime charged upon the priſoner at the bar to be a *felony*. What is the law in ſuch caſe? Sir Matthew Hale expreſly lays it down, "that if a man be indicted as acceſſory before the "fact, he may plead *auterfois acquit* as principal, "becauſe (ſays he) it is in effect the ſame of-"fence." And Serjeant Hawkins, in page 356, ſays, "that when a perſon is once found not guil-

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" ty on an indictment or appeal, free from error " and well commenced before a court which has " juriſdiction of the cauſe, he may, by the com- " mon law in all caſes, plead ſuch acquittal in " bar of any ſubſequent indictment or appeal for " the ſame crime." Sir Matthew Hale cites ſeveral authorities to fortify the doctrine he lays down; and Serjeant Hawkins ſeems to entertain no manner of doubt on the ſubject. In the 4th volume of Blackſtone's Commentaries it is laid down that the plea of *auterfois acquit*, or former acquittal, is grounded on this univerſal maxim of the common law of England, " that no man is to be brought " into jeopardy of his life, more than once, for " the ſame offence." And hence it is allowed, as a conſequence, that when a man is once found fairly not guilty upon any indictment or other proſecution, he may plead ſuch acquittal in bar of any ſubſequent accuſation for the ſame crime.— But it has been urged, that an act of parliament made in this kingdom in the 10th of Henry VII. makes the offence with which the priſoner ſtands charged *high-treaſon*. He denied it. To a man who careleſly and ſuperficially caſts his eye over this ſtatute a conſtruction of this nature may occur, but when it is conſidered that this act contains no expreſs or diſtinct enacting clauſe, conſtituting the crime of procuring a murder to be committed a ſubſtantive independent offence, the doctrine contended for by the gentlemen concerned for the Crown muſt fall to the ground. He was ſorry to ſay this act is very obſcurely penned, and hoped ſhortly to ſee it eraſed out of the ſtatute-book. He took it, therefore, that murder by the act upon which the priſoner at the bar was indicted is made high-treaſon in this country *quoad pœnam* merely; and although it is ſtiled *principal treaſon*, yet

yet it partakes of the nature of mere acceſſorial offences, and of ſuch as are of the derivative kind. —In high-treaſon the wife is admitted a witneſs againſt her huſband, but was it ever known ſince the act of the 10th of Henry VII. until the legiſlature interpoſed, that a practice of that kind prevailed in this country, ſeveral other incidents and appurtenances (if he might uſe the expreſſion), to high-treaſon, never attached to the crime of murder after it was made high-treaſon, in the way he contended for in this country. The determination in the King againſt Doherty, that had been already mentioned, proves what conſtruction the Judges of Ireland, from the earlieſt time to the preſent day, have put on this ſtatute. He knew the Court would have that reverence for the opinion of the ableſt writers on the crown-law that ever lived in this or any other country. He meant Sir Matthew Hale and Serjeant Hawkins. It is true, there is in Forſter a looſe dictum, which ſeems to militate with the doctrine they maintain; but would the Court, at this day, oppoſe the doubt and ſurmiſe of any man, however celebrated he may be as a judge or a lawyer, to the ſettled and uniform opinion of the greateſt Judges in England and Ireland, from time immemorial to the preſent hour. He truſted, for theſe reaſons, the Court would be of opinion that the priſoner's plea ought to be allowed.

Mr. *Browne* ſaid he ſhould not preſs upon the patience of the Court with more than one or two arguments, and he ſhould only offer thoſe for the purpoſe of enforcing what perhaps had been already ſufficiently laboured; but he had not unfrequently obſerved that the very ſame train of thinking, differently habited in words, has had the effect

effect of convincing thoſe who, in another form, did not underſtand the propoſition. This queſtion has been argued on the other ſide, that Foy ought to be tried again, for his life was never in jeopardy; but he contended that was not the fact; for if, on the trial, as *principal*, evidence had been given of *his procuring the fact* to be committed, this would, though he ſhould have been abſent at the perpetration of the fact, have created ſuch a conſtructive preſence as he might have been convicted upon. That this was law, he relied upon the caſe of Lord Dacres, cited in Crompton's Juſtice, and reported in Moore. But if this were denied to be law, there yet remained another reaſon, why the priſoner Foy ought not to be then tried, and he would ſubmit that reaſon to the Court. The *giſt* of the charge upon which Foy was to be tried was, the *Felonious Intention* of having a murder committed; but he had already been in the principal caſe acquitted of that *Felonious Intention*. And he is now required to put his life in iſſue, upon a charge in which he has been acquitted of the very eſſence of it; and diveſted of which, the Jury on either indictment could not find him guilty. Much had been ſaid about the old law: One of the oldeſt law books † ſets down the procurer and the perpetrator of the fact in an equal degree of attrocity, and that the evidence as to the one or the other will convict; but the charge muſt be made at once, and the Crown ſhall not, on having wormed out evidence againſt the ſubject, have recourſe to a new mode of attack. This would involve in itſelf all the danger of diſcharging juries after evidence gone through; for ſo ſoon as it was found that the evidence did not maintain the iſſue, the jury would be directed to acquit the priſoner, and a new indictment ſhaped as a charge of being acceſ-

† Bracton cited in Stamford 102.

acceſſory before the fact would be framed; and this would be too often impoſſible to be repelled, as it would ariſe from looſe evidence of converſations, eaſy of fabrication, and hard to be diſapproved.——He truſted therefore that the Jury would deliver their conſciences like men, and not ſet an example of a man's being put in jeopardy twice for the ſame fact, when they were convinced that it was the ſame fact only with a change of name.

He concluded by ſaying, if he was wrong, his ideas were haſtily adopted upon *the ſpur of the occaſion*, for 'till that morning he had not engaged in the caſe. He frankly wiſhed he had had ſufficient preparation, in another place, where he could have recurred to his books, and have given the ſubject that attention and conſideration of which it was ſo worthy.

Mr. *Whiteſtone* alſo ſpoke on the ſame ſide.

Mr. *Bloſſet*, on the ſame ſide, ſaid, that having been laſt ſpring and at the adjournment of that aſſizes concerned as counſel on behalf of the proſecution of the priſoner, Mr. Fitzgerald and others, for the murder of the late Patrick Randal M'Donnell, and Charles Hipſon, he had thought proper to decline accepting a fee which had lately been offered him on behalf of the priſoner for this trial. That having attended diligently to all the arguments, he thought it had been ably diſcuſſed by the counſels on both ſides; but, though for the reaſon before mentioned, he had not come purpoſely prepared, nor had intended to ſpeak on this occaſion; yet when he found that the laws and conſtitution of this country were attacked by the

the counſel for the proſecution, in a very important part, with extreme ingenuity and eloquence, he conceived it was his duty to defend them ſo far as he was able, and therefore to lay his thoughts before his Lordſhip as *amicus curiæ*; eſpecially as he conceived, that from ſome hints ſuggeſted to him from the arguments of the counſel for the priſoner, *he would be able to throw a few new lights on a ſubject, which had produced differences in opinion amongſt ſome learned writers on the crown law.* He ſaid he would decline ſpeaking to the queſtion, whether the ſtatute 10 Hen. VII. had made murder high treaſon or not, but ſuppoſing the affirmative, he contended that the offence with which the priſoner ſtood charged by the preſent indictment, was one and the ſame treaſon with that charged on him by the former indictment mentioned in his plea. He ſaid that no man could be indicted for procuring a murder, unleſs a murder had been actually perpetrated by the perſons ſpecified in the indictment for that purpoſe, or ſome or one of them; and this had been ſo ruled by the Lord Chief Baron and Mr. Baron Power in the late trials of Fitzgerald, Brecknock and Fulton; that it appeared clear from thence, and indeed from common ſenſe, that procurement was the cauſe, and the perpetration of the murder the effect of that cauſe. That although he allowed the tranſcendent power of an act of parliament, yet he did not allow its omnipotence; for it could not alter the nature of things or make the cauſe and effect ceaſe to be what nature had conſtituted them, one the produce of, and the other the thing thereby produced. That the Court of King's Bench in the well known caſe of the *King verſus Andrews* had held, in conſideration of the ſecond branch of offence mentioned by this ſtatute, that the offence of

treaſon thereby deſcribed, was not fulfilled or committed by any perſon who endeavoured by advice or otherwiſe to excite, to provoke or procure a murder, unleſs a murder was thereby conſequently perpetrated. That the caſe in Lord Chief Juſtice Keiling had ruled, that the acquittal of a perſon indicted as a principal in murder, might be pleaded in bar to a ſecond indictment againſt the ſame perſon, charging him as an acceſſory before the fact for the ſame murder; that being conſidered in England as one and the ſame felony; and even Sir M. Foſter, in his ſtrictures on that ſubject, ſeems to admit that the law was ſo ſettled, and by the firſt verdict and judgment therein, the priſoner was acquitted of all legal malice, the eſſence of the crime, whether it be a treaſon or a felony. That if thoſe principles and authorities, and particularly thoſe very high and recent authorities in this kingdom before alluded to, were well founded and eſtabliſhed, which he truſted they were, it neceſſarily followed that the inciting, provoking or procuring a murder to be committed, could not be deemed a ſubſtantive independent treaſon created by the ſtatute. That the compaſſing or imagining the death of the King, was an offence compleatly terminated and fulfilled by the very imagination or conception of that horrid act, without effecting that death; though it required to be evidenced by ſome overt act conſequential to ſuch conception; and it is equally clear ſince thoſe offences are ſpecifically different, and that the ſtatute has only made uſe of ſimilitudinary words, that it did not mean to convert the eſſence of one crime into that of the other (which it was impoſſible to do) but meant to leave the crime of the procurer to be (what by its nature it muſt be) not an independent ſubſtantive offence, but in the

the nature of an acceſſorial one, dependent upon the crime of a murder already perpetrated, and without the exiſtence of which that acceſſorial offence could have no exiſtence; and therefore ſubmitted that the ſtatute had only enhanced the puniſhment of that crime to be equal in degree to that of the offender in the higheſt branch of treaſon; but had not attempted to change otherwiſe the quality of that offence, the acceſſorial relation therefore remaining as determined to do in other reſpects in high treaſon. He ſubmitted that according to the law ſettled in this caſe in Keiling, and recognized in Foſter, the plea of acquittal as principal, included the crime of acceſſory before, and ought to be allowed now as a compleat bar to a ſecond trial for the ſame treaſon.

Here the counſel on behalf of the priſoner cloſed.

Mr. *James O'Hara* ſaid his reply ſhould be very ſhort, for he thought the authorities mentioned by him, and the counſel on the ſame ſide, had not been ſhaken; their arguments had not been anſwered. It ſeemed admitted that reaſon was with them, but the law againſt them—which was a little abſurd.—One gentleman had ſet out with diſclaiming all reaſonings and all authorities on the ſubject, ſatisfied that the law was now with him, and ſo ſettled by the caſe of Doherty—a caſe of his own reporting.—Another gentleman aſſerted, that ever ſince the 2d of Edw. III. the law was on his ſide, and promiſed to ſhew it by authorities, but his promiſe was forgotten, or could not be performed. The other gentlemen have indeed cited, not caſes or authorities, but dictums from a variety of abridgements and compilations.——And what are theſe—ſuch as the counſel for the Crown have already given a full anſwer to by anticipation; ſuch only, and none other could be ſhewn, as followed

and were founded on the caſe in 2 Ed. III. which has been ſhewn from Hawkins to be inconſiſtent with all the other determinations on the ſubject; inconſiſtent with itſelf—miſtaken—abſurd—and in a part of it abſolute nonſenſe. Murder has been defined, and malice ſhewn to be the eſſence of the crime. And it has been argued, that as the priſoner was acquitted of the malice, he ought not to be tried upon the preſent indictment, in which the ſame malicious intention is the eſſence of the crime. This is eaſily anſwered. It is a play on words. The malice ſtated in the firſt indictment, and the malice in the preſent, were both directed againſt the ſame object; but they were expreſſed by different acts; in the firſt by murder, in the ſecond by procuring a murder. Acquittal on an indictment for ſtabbing, would not bar an indictment for poiſoning the *ſame* perſon. Though, in this caſe too, the malice in both indictments was directed againſt the ſame object.

A ſection in the 29th chap. of Hawk. has been cited to ſhew, that where a ſtatute conſtitutes an offence high-treaſon, it, by implication, makes the procurers of it principals or acceſſories before, upon the circumſtances which would make them ſuch at common-law. He admitted it—And the ſame rule holds as to felonies; but in both caſes, with this exception, (and it is ſo laid down in the end of the ſame ſection) "unleſs the ſtatute expreſly provide "otherwiſe." Now this ſtatute of 10 Henry VII. does expreſly provide otherwiſe; for it makes the procurers principal traitors: and this ſeems to overturn all inferences drawn from this doctrine of implication.

Mr. Stanley has gone out of the way, to argue that an acceſſorial traitor cannot be put upon his trial

trial before the principal actor. This cannot now apply, as one of the principal actors has been executed. It was very ably urged at Caſtlebar, when it was applicable to the ſubject, yet did not then prevail.

To ſhew that murder has not been conſidered high-treaſon in Ireland, upon the trial of it, a determination of Mr. J. Kelly's has been mentioned, his refuſal of a wife as an evidence againſt her huſband upon his trial for a murder. The determination was proper, for this reaſon, that huſband and wife cannot be witneſſes againſt each other in treaſon. The gentleman who mentioned this deciſion probably founded this reaſoning on a looſe opinion in Mary Grigg's caſe, the firſt caſe in Sir Tho. Raymond; but the contrary has been adjudged in Brownlow 47. and it is ſo mentioned in 2 Haw. 432.

He admitted that *auterfois acquit* of murder is a bar to an indictment of petty treaſon for the ſame fact; but *auterfois acquit* in petty treaſon is equally a bar to an indictment of murder. It is ſo laid down in Swan's caſe, mentioned by Mr. Stanley; and he admittted that in that caſe the indictment for murder was quaſhed, but that was done by conſent—it was done after two bills had been found, one for murder and another for petit treaſon, for the ſame offence (which ought not both to have ſtood together, as either was a bar to a trial upon the other). It was done, becauſe the indictment for petit treaſon ſquared better with the evidence, and perhaps *ex majori cautela*, and not from any opinion of the Attorney-General of England, that Swan could not be convicted of murder upon evidence which tended to prove him guilty of petit treaſon. For it is expreſly laid down in Foſter

325,

325, " that a perſon guilty of petit treaſon may be " indicted for murder." Mr. O'Hara being aſked by the Court, what he could ſay to the caſe of Doherty, at Roſcommon? He ſaid, he had never before this day heard of the caſe; he thought very little reſpect ought to be paid to the caſe, as the gentlemen who pretended to report it differed ſo widely in their account of it. Mr. Bloſſet and Mr. Burke, who were at Roſcommon, were very poſitive that it was a caſe of murder; Mr. Stanley, who was not there, was yet more poſitive that it was a caſe of burglary; and the two firſt mentioned gentlemen yielded up their opinions. It is ſaid to have been argued before the judges. This muſt be a miſtake; it is impoſſible that a matter of ſuch a nature could have paſſed intirely *ſub ſilentio*.

Here Mr. *O'Hara* having cloſed his reply, the Judge proceeded to charge the Jury.

Sir

Sir SAMUEL BRADSTREET's

CHARGE TO THE JURY.

I HAVE heard three counſel on one ſide, and eight I believe on the other. Some of them have been pretty long too: I ſhall not imitate them in that; for I ſhall ſay but very few words. As at preſent adviſed, I think the plea ought to be allowed, and the Jury ſhould find for the defendant. I am of opinion that, in this caſe, I ſhould govern my direction to the Jury upon the rules of law, with reſpect to *principal* and *acceſſory* in caſes of felony. Whether murder be or be not high-treaſon, under the ſtatute of Henry VII. I ſhall give no opinion: but although it ſhould be ſo conſidered, yet in the conduct of the trials of thoſe traitors, who, if it was but felony, would be principals and acceſſories before the fact, the ſame rules are to be obſerved, and the ſame benefit of pleading allowed as before the ſtatute, which conſtitutes the offence high-treaſon. According to Mr. Juſtice Forſter's reaſoning, in his Diſcourſe of High-treaſon, I take the law to be ſettled, that if a man is tried and acquitted as a *principal* in felony, he cannot afterwards be indicted as an *acceſſory before* the fact for the ſame felony. Mr. Juſtice Forſter has thrown out ſome ingenious doubts, and which have been repeated at the bar, as to the original ground of this rule of law; but he acknowledges that the law is now ſettled as I have ſtated; and I am to determine by the law as it is, not by what it may be conceived it ought to be. Therefore if this was a caſe

a caſe of felony, the plea muſt be allowed: But it has been argued, that the ſtatute making murder high-treaſon has, by its penning, made the *procuring*, *ſtirring*, and *provoking* a murder, a diſtinct offence from the actual commiſſion of the fact. In a certain degree it has; but I think not any farther than the offence of the *acceſſory before* the fact in felony is diſtinct from the offence of the *principal*. —The ſtatute ſays that the procurer, ſtirrer, or provoker to a murder, ſhall be deemed guilty of the ſame offence as the actual murderer. What is this but ſaying in other words, that the acceſſory before the fact in murder ſhall hereafter be deemed guilty of the ſame offence as the principal; for the procurer, ſtirrer, or provoker of a felony (if not preſent at the fact) can only be an acceſſory before the fact. And although, in legal language, when a ſtatute makes a felony high-treaſon, we cannot with propriety make uſe of the expreſſions *principal* and *acceſſory*, yet that, which was an acceſſorial offence before the ſtatute, will, although made high-treaſon by ſtatute, ſtill partake of the nature and quality of an acceſſorial offence, and be entitled to the ſame benefit of pleading as before the ſtatute. There are many ſtatutes which create felonies, and afterwards go on declaring, that thoſe who procure, ſtir, or provoke the offence, ſhall be deemed felons; yet in the conſtruction of theſe ſtatutes the procurers, *&c.* have been uniformly conſidered and proceeded againſt as acceſſories before the fact, and not as principals; and I think that a ſimilar conſtruction and practice ought to be given to this ſtatute, even ſuppoſing it makes that offence, which was before felony, high-treaſon. I do not ſay but the priſoner might have been proceeded againſt, either as the actual murderer, or as the procurer of the murder. So

in

in cafes of felony, a man may be proceeded againſt as principal or acceſſory before the fact; the proſecutor has his option; ſo far they are diſtinct offences; but if he will indict the priſoner as the actual murderer, or in felony as the principal, and the priſoner is acquitted, I do not think he can afterwards be indicted as an acceſſory before the fact in felony, or as the procurer of the murder. In a caſe of murder, the procurer, though deemed guilty of treaſon by the ſtatute, being notwithſtanding, in the nature of an acceſſory before the fact, is as ſuch entitled to every legal defence ſuch acceſſory would be entitled to before the ſtatute. Upon the whole, I think the Jury ought to find for the defendant. But as I underſtand I have the misfortune of differing from two very learned and able Judges, for whoſe opinions I have the greateſt deference, I am happy that this ſubject is not concluded by my opinion. If I am wrong, a writ of error may be brought. I ſincerely hope it may, that the law upon this point may be ſettled; and I ſhall, upon hearing the ſubject more fully argued, have not the leaſt ſcruple to alter my opinion, if it ſhall appear to me not to be well founded.

And the JURY then found the following VERDICT:

" AND the Jurors upon their oaths, do ſay, VERDICT
" That the treaſon, murder, and offence in the
" ſaid indictment, of which the ſaid James Foy
" was, heretofore, by the jurors of the ſaid jury
" acquitted, in manner and form aforeſaid, is one
" and the ſame treaſon, murder, and offence for

" which the ſaid bill of indictment on which the " ſaid James Foy, otherwiſe Sladdeen is now " arraigned and found."

It was then ruled by the Court, that he be diſcharged, upon entering into ſureties for his good behaviour for three years, himſelf in a recognizance of 500l. and two ſureties in 250l. each.

IT has been thought proper to ſubjoin the following Proceedings in the Court of King's-Bench, relative to this Caſe, and alſo that of George Robert Fitzgerald, Eſquire.

MICHAEL-

MICHAELMAS TERM.

26 GEO. III. 1786. *B. R.*

The KING *againſt* JAMES FOY.

UPON motion of Mr. Attorney General, the COURT made the following Rule: Saturday, Nov. 11.

" LET a writ of *Certiorari* iſſue, directed to the " Juſtices of Aſſize for the county of Mayo, the " Clerk of the Crown of the ſaid county, or his " deputy, to remove an indictment for wilfully, " felonioufly and traitorouſly provoking, ſtirring " up and procuring Andrew Creagh to murder " Patrick Randal M'Donnell, Eſquire."

IN the courſe of this motion the Attorney-General obſerved, that the whole of the proceedings had appeared to him very extraordinary, and that he apprehended that he would be obliged to bring error upon this occaſion.

REX verſus *FITZGERALD.*

Monday, Nov. 27. Mr. STANLEY, on behalf of the *perſonal repreſentative* of the late *George Robert Fitzgerald*, moved the Court for a *Certiorari* to the Clerk of the Crown of the county of *Mayo*, to remove the RECORD of the INDICTMENT, CONVICTION and ATTAINDER of *George Robert Fitzgerald*, Eſq; for the murder of *Patrick Randal M'Donnell*, Eſq; and *Charles Hipſon*, that ERROR might be aſſigned.

Mr. Juſtice ROBINSON. Have you the *conſent* of the *Attorney-General?*

Mr. ATTORNEY GENERAL. I have ſo far from *conſented*, that I will *oppoſe* the motion. I believe I ſhall make a motion for a *Certiorari*; but for a very different reaſon.

Mr. Juſtice ROBINSON. Where an ATTAINDER for HIGH-TREASON, there is no inſtance of a *writ* of ERROR, or CERTIORARI, without the *conſent* of the Attorney-General.

Mr. STANLEY. When a CERTIORARI is applied for on behalf of the CROWN, it is *matter of courſe* to grant it—when it is applied for on behalf of the PRISONER, it is *diſcretionary* in the Court

to

to *grant* or *refuſe* it. As to the *writ* of ERROR, he admitted that the *conſent* of the Attorney-General muſt be had before it could iſſue. *Good cauſe*, he ſaid, would be aſſigned for iſſuing it, and the Attorney-General might conſent, or not conſent, as he might think proper.

Lord EARLSFORT. Mr. *Stanley* proceed in your motion.

Mr. *Stanley* repeated his motion.

The COURT. Have you the *certificate* of the Clerk of the Crown of the proceedings?

Mr. STANLEY. No; but the fact is notorious, and from the authority of the Attorney-General, in the caſe of the *King* and *Foy*, I did not apprehend ſuch a certificate to be neceſſary.

Mr. ATTORNEY-GENERAL. Mr. *Stanley* muſt be miſinformed. I ſhould not be ſo great an *ideot* as to make ſuch a motion, without ſuch a certificate in my hand.

The COURT. There muſt be a certificate.

Mr. STANLEY. Then my motion muſt drop for the preſent; but a certificate ſhall be procured.

The COURT. Take nothing by your motion.

APPEN-

APPENDIX.

10th Henry VII. cap. 21.

An Act whereby Murder of Malice prepenſed is made Treaſon.

ITEM, prayen the Commons, that foraſmuch as there hath been univerſal murder by malice prepenſed uſed and had in this land by divers perſons contrary to the laws of Almighty God and the King, without any fear or due puniſhment had in that behalf, that it be ordeyned, enacted, and eſtabliſhed by authority of this preſent Parliament, and of the Lords ſpiritual and temporal, and Commons in the ſame aſſembled, That if any perſon or perſons, whatſoever eſtate, degree, or condition he or they be of, from the feaſt of the purification of our lady, the tenth year of the reign of our ſovereign Lord King Henry the Seventh forward, of malice prepenſed do ſlee or murder, or of the ſaid malice provoke, ſtir, or procure any other perſon or perſons to ſlee or murder any of the King's ſubjects within this land of Ireland, be deemed traytor attainted of haute treaſon, likewiſe as it ſhould extend to our ſovereign Lord's perſon, and to his royal Majeſty, and then the chief lords have the eſcheats and forfeitures of all manor lands, tenements, rents, ſervices, with their appurtenances; any act or ordinances to the contrary hereof notwithſtanding.

9th Anne,

9th Anne, cap. 4.

An Act for bringing an Appeal in Case of Murder, notwithstanding the Statute of the 10th of King Henry the Seventh, whereby Murder is made High-Treason.

WHEREAS by an act of Parliament made in this kingdom in the 10th year of the reign of King Henry VII. intitled, "*An Act whereby Murder of Malice prepensed is made Treason*," a doubt has arisen, whether any appeal of murder since making the said act can or may be brought by the subjects of this realm, and others, as the same might have been brought before making the said act, by reason whereof many murders have escaped unpunished; for clearing of which doubt, be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present Parliament assembled, and by authority of the same, That nothing in the said act shall from henceforth be taken, construed, or intended to bar or take away the right of any person or persons from bringing appeals of murder; but that such appeals of murder shall and may from henceforth be had and brought, and such proofs, proceedings, and judgment, shall and may be thereupon had and given, as might have been brought, had, and given at or before making of the said act; the said statute or any thing therein contained to the contrary in any wise notwithstanding.

FINIS.